The ANTITRUST BULLETIN

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MEETING GOVERNMENT ANTITRUST INVESTIGATIONS*

by

MALCOLM A. HOFFMANN**

I have been asked to talk on the subject of meeting government antitrust investigations. I suppose that by "meeting" is meant "defeating" government investigations, a subject which holds considerable interest for both client and the antitrust defense bar. An obvious, if painful, course to follow in defeating government investigations is for the client always to behave himself and avoid all appearance of violation of the antitrust laws. If your client is so scrupulous a law-abiding citizen you need no advice along this line. If your files recording business transactions of the last 35 years show no indications of restraints of trade, price discriminations, attempts to monopolize the market or to exclude your competitors from it, the thing to do when the government investigators come is to welcome them with open arms. Unfortunately for those who conduct business affairs, and happily for members of the antitrust bar, a large company's files rarely are this clean and generally contain evidences of transactions which may be illegal under the antitrust laws.

It is not my function to talk to you about the vagaries of the antitrust laws, their uncertainty in application or their case-by-case development of new principles. It is enough to observe that a large industrial entity can rarely be certain whether or not it has violated the antitrust laws.

Whether you believe with Mr. Justice Hughes that the antitrust laws are a charter of economic freedom of almost constitutional dignity,[1] or, with Mr. Justice Holmes that the antitrust laws are "humbug based on economic ignorance and incompetence,"[2] your

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* This lecture was delivered at a session in the Practicing Law Institute on May 21, 1958, attended by corporation house counsel.

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1 *Appalachian Coals* v. *United States*, 288 U. S. 344, 359-360.

2 1 *Holmes-Pollock Letters*, 163.

client is in trouble when the Antitrust Division of the Department of Justice starts an investigation. All of the papers which the government will scrutinize from the company's files will be tested against a government lawyer's presuppositions of what has been done wrong. These papers may also create leads to oral testimony or serve as the foundation for the investigation of others. If the government lawyer is diligent enough, and if there has been some violation of the antitrust laws, or some doubtful economic dealings which the government seeks to challenge, the government lawyer generally can be counted on to find it. The Department of Justice has at its disposal for investigative purposes not only lawyers in its field offices, and special agents of the Federal Bureau of Investigation, but also Grand Jury subpoena powers and informants who may be purchasers, competitors, suppliers or just good citizens out to see that a mighty wrong is righted.

The investigations of the Antitrust Division of the Department of Justice arise primarily under the Sherman Act, although the Department often invokes the Clayton Act and has obligations imposed upon it by the Congress under many other lesser known statutes.[3]

Washington and the field offices of the Antitrust Division receive complaints at the rate of about 1,000 a year.[4] Occasionally, the Department will proceed on its own motion, as in aid of a program against patent concentration or the high cost of food, clothing and housing.[5] In either case, an investigation usually starts with what in the Department is called a "preliminary inquiry." After the complainant's letter has been examined or he has been interviewed, certain obvious lines of inquiry are indicated to government lawyers. A lawyer may now decide to call upon your client to make a preliminary check of the assertions in the complaint and the lawyer may also be interested in access to some of the company's files. At this stage, although the lawyer's suspicions have been energized by the complainant, he does not know enough about the industry or your

[3] There are approximately 65 such statutes. See, Elmer A. Lewis, "*Antitrust Laws With Amendments 1890-1945*," G.P.O. 1948; ICCH Trade Reg. Rep. ¶100.

[4] Hollabaugh, Marcus A., "*Development of An Antitrust Case*," *ABA*: *Antitrust Trials and Antimonopoly Hearings—1954*, p. 15.

[5] Nitschke, *Procedure In Antitrust Investigations*, 4 Illinois Law Forum 593, 594.

client's conduct of his affairs to recommend formal action. The purpose of his coming to the company generally is to determine whether enough mischief exists to suggest a formal investigation. An Antitrust Division lawyer rarely has horns in the back of his head and will generally start his preliminary inquiry by a polite telephone call to a company official seeking an appointment. Most house counsel I know will suggest that the interview take place with counsel present. Sometimes it is not possible to pass the buck quickly enough and house counsel finds it necessary to attend without the benefit of the outside doctor, i.e., a representative of what we are pleased to call the "antitrust defense bar."

The first question raised by the syllabus which I have been asked to cover is, "Should investigators be permitted to search files?" You will have to answer that question when the Antitrust Division lawyer or an FBI Special Agent comes to see you. My answer would be "Yes," providing he is prepared to make a specific request for files designating the specific subject matters of his interest. If he says "I want to see all executive files from 1900 to the present," I think, of course, he should be told that he is asking for too much and although the company is pure as the driven snow, and quite willing to cooperate with the government, it wishes a precise formulation of the files in which the government is interested before deciding to comply with the government's request. If possible, get the government investigator to agree to put this request in writing so that his superiors will not be aggravated later on by the feeling that important files have been held back and the investigator has been led down the primrose path of Annual Reports and Directives Concerning Office Outings. This advice is subject to the important qualification that if you feel the files the investigator is interested in contain a number of ambiguous documents, or show violations of the antitrust laws, you should politely but firmly tell the investigator to go away.[6] The client may be hung later on but it is nice to have the feeling that you did not willingly fashion the rope which hung him. If he is turned away, the government lawyer may be forced to recommend to his superiors

[6] The risk if you do so is "... a refusal to give information necessarily raises a psychological presumption, first, that your client is concealing something, and, second, that what he is concealing is significant." *The Antitrust Laws from the Point of View of the Government Attorney*, S. Timberg, PLI (1949).

that he be given Grand Jury authority in order to get access to your client's records. He does not automatically get such authority, but must write a memorandum which sets forth some plausible basis for supposing that the law has been violated. If the complaint which has been made to him is too flimsy, he may be reluctant to request Grand Jury authority.[7]

In the normal course, however, if you have refused access to files, you may expect to receive a Grand Jury subpoena duces tecum.[8] That subpoena will make specific demands for documents and the government's ignorance of your affairs may lead to the result that the demands are not pinpointed to the most vulnerable targets. Few hardened members of the defense bar lose any sleep over this.

Compliance with a Grand Jury subpoena for documents often proves a better course than permitting government investigators to scrounge at will. I remember being told that one of our largest corporations paid a very substantial sum to outside counsel to make what was euphemistically called "a legal audit of their files." This company, with considerable justice, felt that it was bilked when shortly thereafter it permitted government lawyers to make what is also euphemistically called "a voluntary file search," and among the remaining documents those lawyers found enough material to support one of the most celebrated antitrust cases of the last twenty years.

If a Grand Jury subpoena duces tecum does issue,[9] it is usually as strictly construed by counsel as if it embodied a penal statute. I know of no case which says that the language of such a subpoena must be strictly construed, but it is the practice of counsel to pause over every word and to confine words to their obvious meaning within

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7 "It has been the Division's practice when Grand Jury action is deemed necessary for a memorandum to be directed to the Attorney General by the Assistant Attorney General in charge of Antitrust setting forth the facts and recommendations. This recommendation is made only after careful consideration of the facts and consultation with the field office chief, section chief and other assistants involved." Nitschke, *Procedure in Antitrust Investigations*, University of Illinois Law Forum, p. 593 (1950).

8 A search warrant, probably available under Criminal Rule 41, has not to my knowledge been used by the Antitrust Division.

9 The Antitrust Division can, and frequently does, launch a full-scale FBI investigation in place of use of the Grand Jury. See Decker, *Antitrust Investigations and the Lawyer*, II Antitrust Bull. No. 2, Oct. 1956, pp. 115-116. The requests of FBI agents for interviews or files bear no coercive sanctions and they may be dealt with as described at pp. 4-5 above.

the limits of good conscience. If they did not do so, they might often find themselves in the position of merely transshipping all of the company's records to the field offices of the Department of Justice.

There is generally a portmanteau or waste basket provision, as it is sometimes called, in the Grand Jury subpoena. Typical is the following:

> All documents, correspondence, telegrams, reports, memoranda, records of telephone conversation, records of conference, inter-office communications and all other writings of every kind in the possession or control of your company, its officers, directors, agents, representatives or employees, prepared by and passing between your company, its officers, directors, agents, representatives or employees on the one hand and the Blank Company and its officers, etc. on the other hand, from January 1, 1942 to the date of service of this subpoena in any way relating to or referring to the domestic manufacture or sale of nuclear bombs or related to explosive material, or the parts, circuits or components thereof, or to the purchase, sale, assignment or holding of patents, patent rights, licenses, technology or know-how for the manufacture, use or sale of such bombs or equipment or the parts, circuits or components thereof within the United States.

Please do not suppose that this subpoena is too broad. Subpoenas in very similar form have withstood attack in the Courts. It is true, however, that these catch-all provisions are generally related to specific demands and probably would be just as effective if they merely called for all writings of any kind relating to the specific demands. We of the defense bar strictly construe Grand Jury subpoenaes because construction of words is the only real defense we have against a total surrender of all of our client's records.[10]

Attacks upon the scope and operation of a Grand Jury subpoena for any reason are usually unsuccessful. This is because, as the Supreme Court has said, "A grand jury has plenary inquisitorial powers," *Hale* v. *Henkel*, 201 U. S. 43, 63 (1906). Its "power and duty * * * to investigate is original and complete * * * and is

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[10] But see: *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186.

not therefore dependent for its assertion upon the approval or disapproval of the court." *U. S.* v. *Thompson,* 251 U. S. 407, 413 (1920). Judge Learned Hand said of grand jurors: "They are the voice of the community accusing its members, and the only protection from such accusation is in the conscience of the tribunal. Therefore, except in sporadic and ill-considered instances, the courts have never taken supervision over what evidence shall come before them." *In Re Kittle*, 180 Fed. 946, 947 (C. C. S. D. N. Y., 1910). Cf. *In re Applications of the Texas Co.*, 27 F. Supp. 847 (D. C. E. D. Ill., 1939).

The fact that counsel believes that his client has not engaged in illegal conduct and, therefore, should not be put to the burden of complying with broad requests for information is of no interest to anyone but himself since the Courts have said that the power of a Grand Jury to investigate cannot be limited by "forecasts of the probable results of the investigation," *Blair* v. *U. S.,* 250 U. S. 273, 282 (1919).

A grand jury subpoena, like most everything affecting antitrust life, is subject to the test of reasonableness. If each of the items of the subpoena is limited to a reasonable period of time and specifies with reasonable particularity the subjects to which the documents called for relate, the subpoena, no matter how burdensome, will probably withstand all attack in the courts. *Brown* v. *United States*, 276 U. S. 134, 143 (1928); *Blair* v. *United States,* 250 U. S. 273, 282 (1919); Fourth Amendment, U. S. Constitution.

The volume of matters called for by a grand jury subpoena is not the measure of its reasonableness, and particularly is this true where the company under investigation is large. Where that is the case, the government can and has argued that the extent of the company's business activities makes necessary that it keep voluminous records relating to the activities under investigation and the subpoena is burdensome not because of the way it is drawn but because of the nature of the business being investigated.

Consequently Judge Barnes of the Eastern District of Illinois (not the former trust-buster who sits on the Ninth Circuit) said in an unreported opinion, *In re the Petition of the Borden Company* (September 12, 1938):

> "I do not think that the question of reasonableness or unreasonableness in the demands of a subpoena duces tecum is to be determined by the number of documents called for, their weight, or the aggregate of their mass." [11]

The reasoning behind this type of result is that the public interest, when weighted against private detriment, always tilts the scales against the suppression of truth. *McMann* v. *S. E. C.*, 87 Fed. 2d, 377, 378-9, CCA 2; *In re Motion to Quash Subpoenas Duces Tecum*, 30 Fed. Supp. 527 (D. C. S. Cal., 1939).

There is no fixed formula to measure the reasonableness of time or the other elements of a subpoena. The tests vary in context with the "nature, purposes and scope of the inquiry," *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 209. In *In re United Shoe Machinery Corp.*, 73 Fed. Supp. 207, D. C. Mass. 1947, Judge Healey sustained a subpoena going back 27 years. In the Soap Investigation, Judge Forman sustained items going back about 30 years. Some cases, however, have limited the items to 10 years.[12]

Although some cases have limited the subject matters which the Grand Jury may inquire into,[13] if the grand jury's powers are plenary, these cases seem to have reached a wrong result except insofar as a Grand Jury investigation is limited by the scope of the authority conferred upon the government lawyers by the Attorney General.[14] The rule most likely to be followed is merely that the subpoena must describe the subject matter called for, and that the test of relevancy of a document is whether it is relevant to the descrip-

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[11] Nitschke, *op. cit.*, says: "The Borden subpoena was also a classic example of a 'burdensome' subpoena. The response weighed 50 tons, filled 10 truckloads and required strengthening one wing of the courthouse in order to store the documents. See *Petition of Borden Co.*, 75 F. Supp. 857 (N. D. Ill. 1948). See also *United States* v. *Watson*, 266 Fed. 736, 738 (N. D. Fla. 1920); *In re Motion to Quash Subpoenas Duces Tecum Returnable before the Second Grand Jury*, 30 F. Supp. 527 (S. D. Cal. 1939); *In re Grand Jury Investigation*, 33 F. Supp. 367 (M. D. N. Car. 1940); *In re United Shoe Machinery Corp.*, 7 F. R. D. 756 (D. Mass. 1947); *Application of Linen Supply Companies*, 15 F. R. D. 115, 118 (S. D. N. Y. 1953).

[12] *In re Fred W. Mears Heel Co.*, 7 F. R. D. 759; *In re United Shoe Machinery Corp.*, 7 F. R. D. 756; *In re Grand Jury Investigation*, 33 Fed. Supp. 367; *Application of Linen Supply Companies*, 15 F. R. D. 115; *In re Investigation of World Arrangements*, 13 F. R. D. 780; *In re United Last Company*, 7 F. R. D. 759.

[13] *In re Eastman Kodak*, 7 F. R. D. 760, 767; *In re Grand Jury Investigation*, 33 Fed. Supp. 367 (limited to fertilizer).

[14] 5 U. S. C. §310.

tion contained in the subpoena.[15] That description must be such that the subpoena can be complied with by a person of ordinary intelligence, and certainly this requirement is met where the documents are described with enough particularity to enable a witness to understand what the government wants.[16]

It is not necessary, of course, to disclose privileged communications in compliance with a grand jury subpoena. *United States* v. *Medical Society*, 26 F. Supp. 55, 56. The extent to which the attorney-client privilege operates to guard communications made to house counsel has not been made entirely clear by the cases. Obviously such counsel cannot be used as a safe repository for all questionable corporate files, for the rule is well settled that records prepared prior to or not for the purpose of legal consultation are not within the ambit of the privilege merely by virtue of being transferred to attorneys.[17] Nor is the privilege retained if a lawyer is acting in a business as opposed to a legal capacity.[18] However, the fact that the attorney is employed as house counsel rather than as an "independent" lawyer should not in itself oust the privilege.[19] The test is whether he was acting as a lawyer in connection with the communication in question.[20]

Since a subpoena duces tecum is supported by the sanction of contempt, it is important that before the return date of the subpoena, if it be objectionable, a formal attack on the subpoena be made. This

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15 *In re American Medical Association*, 26 Fed. Supp. 58.

16 *In re Storror*, 63 Fed. 564, 568 (N. D. Calif. 1894); *Brown* v. *U. S.*, 276 U. S. 134, 143; *Application of Harry Alexander, Inc.*, 8 F. R. D. 559, 560 (S. D. N. Y. 1949).

17 *Grant* v. *United States*, 227 U. S. 74, 79 (1913); *Jones* v. *Reilly*, 174 N. Y. 97 (1902); Simon, *The Attorney Client Privilege as Applied to Corporations*, 65 Yale L. J. 953, 978.

18 *Zenith Radio Corp.* v. *R. C. A.*, 121 F. Supp. 792, 794 (D. C. Del. 1954). See also numerous examples cited in *Simon*, supra, at pp. 973-75.

19 *Georgia & Pacific Plywood Co.* v. *United States Plywood Corp.*, 18 F. R. D. 463, 464 (S. D. N. Y. 1956); *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 360 (D. C. Mass. 1950). Cf. *Connecticut Mutual Life Insurance Co.* v. *Shields*, 16 F. R. D. 5, 7 (S. D. N. Y. 1954).

20 Where too much valuable evidence would be insulated by according the privilege, the court might be pushed towards a finding that house counsel were not "acting as lawyers." *Simon*, supra, at page 973. And the fact that house counsel was not a member of the bar of the State where the action was pending is regarded as being at least strongly probative that counsel's function was non-legal. *United States* v. *United Shoe*, supra, at p. 360. Cf. *Georgia Pacific Plywood Co.* v. *United States Plywood Corp.*, supra.

can be done by a motion to vacate or modify.[21] Once that motion is lost, there is no appeal, and only a stalwart citizen will risk challenging a subpoena by first placing himself in contempt of court. Unfortunately, if documents are turned over to the government and it is later determined that the subpoena was improper, the documents can be used against your company, since the principles which apply in the case of illegal search and seizure do not apply to a grand jury subpoena. *United States* v. *Wallace & Tiernan Co.,* 336 U. S. 793.

In complying with the Grand Jury subpoena, it is best to work out an agreement with the antitrust lawyers handling the matter. The subpoena likely will contain an *ad testificandum* clause which calls for an officer of the company to identify the documents produced. Generally all the government wants is the documents, and if you work out such an agreement it will waive the need for oral testimony and accept copies in lieu of original documents. This latter is important, since it may be years before the originals will be returned. Generally for such an agreement the government exacts the price that the company will not attack the authenticity or genuineness of the documents in any subsequent proceeding, and that the copies may be used in evidence in place of originals.

If an official of the company is called upon merely to identify documents, it is not necessary to offer him immunity, but government counsel must be careful to confine his examination to mere technical questions of identification of the documents. Once the witness is questioned about anything relating to the substance of an investigation, it would seem that immunity is automatically extended to him.[22] In order to be safe, however, it is the wisest course for a corporation official, after identifying himself and the records which he has brought before the grand jury under a subpoena *duces tecum* which contains an *ad testificandum* clause, to ask that he be given a personal subpoena before he will testify to anything else. The reason for this caution is that since the subpoena is addressed to the corporation, there is some possibility of a ruling that the personal immunity of the statute does not automatically apply.[23]

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21 Rule 17 of Federal Rules of Criminal Procedure.

22 32 Stat. 904, 15 U. S. C. 32; 34 Stat. 798, 15 U. S. C. 33; *U. S.* v. *Monia,* 317 U. S. 424.

23 For immunity to attach the witness must be testifying in obedience to a subpoena within the meaning of 15 U. S. C. Sec. 33. The question is whether this is

Unlike most immunity provisions, the immunity statute under the antitrust laws need not be claimed and so long as a witness personally appears before the grand jury under compulsion of the subpoena, he obtains immunity with respect to anything incriminating to which he testifies. Consequently, it is held that he may not refuse to testify since he can in no way incriminate himself. *United States* v. *Monia,* 317 U. S. 424. The immunity, however, extends only to a natural person and a partnership which, in the reckoning of the law, consists of natural persons (*In Re Subpoena Duces Tecum,* 81 F. Supp. 418) but does not apply to a corporation (*United States* v. *Wilson,* 221 U. S. 361; *United States* v. *Bausch & Lomb,* 321 U. S. 707) and entities so large and impersonal that they are dealt with in the same way as are corporations. *Brown* v. *United States,* 276 U. S. 134 and *United States* v. *White,* 322 U. S. 694. The privilege, of course, is personal to the witness and does not extend to anyone else and not to the corporation which employs him. Further, an officer of a corporation cannot secure immunity from the production of corporate records, even though the records incriminate him personally, since the records are those of the corporation and the officer merely holds them in an official and not a personal capacity.[24] Immunity would seem to apply for any individual who testifies before the Grand Jury and whose testimony goes beyond mere identification of himself and the records he has brought with him.[25] Consequently, prosecutors often ask witnesses to waive immunity. Whatever the merits of this request in dealing with run-of-the-mill crimes, I think it ought not be made in antitrust investigations where the witness may have no way of knowing whether or not he

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what he is doing when he responds to a subpoena addressed to the corporation. In *In re Chilcote,* 9 F. R. D. 571 (N. D. Ohio 1949) the Court said he could have immunity "if timely asserted" (573). A result *contra* was reached in an unreported decision in *U. S.* v. *Wisconsin Cheese* (Cr. No. 33198 N. D. Ill., July 31, 1942). When, however, one Samuel Morgan in response to a subpoena both in testimony and documents mixed personal with corporate affairs he was held not entitled to immunity. *U. S.* v. *Consumers Ice Co.,* 84 F. Supp. 46 (W. D. La. 1949).

24 *Esgee* v. *U. S.,* 262 U. S. 151, 158. Even though personal and corporate records are mixed together, it is likely that the Court will grant no immunity for the personal records. *U. S.* v. *Consumers Ice Co., supra; Wilson* v. *U. S.,* 221 U. S. 361, suggests, however, that under special circumstances the records may be separated.

25 28 U. S. C. Sec. 377 states that the immunity extends "only to a natural person who, in obedience to a subpoena, gives testimony under oath . . ."

is guilty of a crime, and, save for extraordinary circumstances, I would not counsel my client to waive immunity.

A few separate observations are needed about FTC investigations. The Federal Trade Commission, since it does not have to fall back on the Grand Jury, but enjoys its own subpoena powers, can get information more quickly and effectively than can the Department of Justice. It has the power of access to documentary evidence for examination and copying (Sec. 9, Federal Trade Commission Act, 15 U. S. C. 49); it has the power to require special and annual reports (Sec. 6(b) 15 U. S. C. 46); and it has subpoena powers (Sec. 9, 15 U. S. C. 49).[26] Harry A. Babcock, who is the Chief of the Federal Trade Commission's Bureau of Investigation, has said that this combination of fact-finding power represents the broadest power available to any agency of the government (AN ANTITRUST HANDBOOK, ABA, Section on Antitrust Law, 1958, p. 386). Moreover, the statutes themselves create heavy penalties for failure to make responsive returns to the lawful demands of the Commission. For example, Section 10 of the Federal Trade Commission Act provides, for a falsification of evidence or wilful refusal to submit evidence, a fine of $1,000 to $5,000 and/or imprisonment up to three years. The compulsory power of the Commission to require "annual and special reports or answers in writing to specific questions" (Sec. 6(B)) makes life far easier for Commission investigators than it is for the Department of Justice. The Supreme Court in the *Morton Salt* case, 338 U. S. 634 (1950) has said that this power can be used merely to satisfy "official curiosity" (p. 652). Presumably the Commission through the use of this sanction can get all it wants although the Supreme Court indicated that it would not require automobile companies to file automobiles in replying to the Commission's demands (p. 653). If a corporation is called upon to submit a special report by the Federal Trade Commission it must do so

[26] Until recently there were divided opinions (*Cf. FTC* v. *Rubin,* 145 F. Supp. 164 (D. C. N. Y. 1956) with *FTC* v. *Menzies,* 145 F. Supp. 164 (D. C. Md. 1956)) as to whether the FTC's subpoena power could be used to investigate all violations under the Clayton and the FTC Acts, or whether the FTC subpoena power was restricted to FTC Act violations where this power is specifically set forth. However, this dispute has been resolved in favor of the FTC by a number of recent Circuit Court decisions (*FTC* v. *Rubin,* 245 F. 2d 60 (2d Cir. 1957), *reversing* 145 F. Supp. 164; *Menzies* v. *FTC,* 242 F. 2d 81, *affirming* 145 F. Supp. 164, cert. den. 353 U. S. 957 (1957); *FTC* v. *Reed,* 243 F. 2d 308 (7th Cir. 1957)).

promptly because the statutory penalty for failure to comply is $100 a day and in the *Morton Salt* case penalties under this provision ran up to $80,000. The power to secure reports and the power of access to documentary evidence for the purpose of examination and copying as provided in Sec. 9 of the Federal Trade Commission Act mean that the FTC can, if it wants to, get quick access to your files and there is very little that you can do to prevent use of these visitorial powers. Since the FTC can't enforce its own *subpoena* powers, you cannot even go to Court to attack an FTC subpoena until the Commission itself invokes the aid of the Court to enforce it. However, the Commission itself seems rather to prefer voluntary investigational procedures to use of compulsory process and there is every reason for a company to prefer to deal with the FTC on a voluntary compliance basis.

I observed at the outset that government investigations under the antitrust laws can do you no harm if your documents are such as to suggest only innocent behavior. It seems to me, however, that few if any large corporations selling goods in numerous different transactions can avoid at least an occasional violation of the Robinson-Patman Act even though corporate management desires to comply strictly with all of the antitrust laws. It is almost inevitable that some zealous salesman is going to take it upon himself occasionally to cut a price in order to secure a customer. In doing so he may also prove again that the pen is mightier than the sword. The files of a company if preserved forever in their entirety can generally be counted upon to disclose some mischief. This circumstance raises the consideration of whether it is not desirable from time to time for a company to destroy its files. There are, of course, other and more persuasive reasons for doing so than possible divulgence of a wrong. The business records necessary for the running of a business are for the most part fairly limited and if all pieces of paper written by all corporate employees are preserved for eternity most of the corporate income will eventually be devoted to payment for warehouse space. Consequently, many a company adopts a policy of regular destruction of files, keeping intact only such files as the law requires,[27] and such files as are essential to the continued efficient

[27] A check made by the Supreme Court in 1947 of statutes requiring the keeping of records listed 26 statutes and the listing did not pretend to be complete. *Shapiro v. United States*, 335 U. S. 1, 6, note 4.

operation of the business. The practice of making a periodic examination of files serves the salutory purpose of bringing to life any business practice which needs change and which may be unknown to top corporate officials. It makes possible a voluntary policing program by the company which may have the effect of keeping it out of antitrust troubles and keeping its behavior law-abiding. I know of several companies which make a routine practice of destroying annually all files more than three years old, and I am told that many companies destroy files more frequently than that.

When, however, a formal investigation has begun, files must be maintained intact. Two Acts of Congress control the situation. The so-called "false statement" statute provides that "whoever in any manner within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme or device a material fact . . . shall be fined not more than $10,000 or imprisoned not more than five years or both (62 Statute 749, 18 U. S. C. Sec. 1001). The obstruction of justice statute makes possible five years' imprisonment or a $5,000 fine or both for obstructing or impeding the due administration of justice. 18 U. S. C. 1503, 62 Statute 769." It would appear that these two statutes as well as the Canons of Professional Ethics[28] would effectively serve to prevent a lawyer from advising his client to destroy records while the government is conducting an antitrust investigation. In *U. S.* v. *Rudolph Ilgner*, Crim. No. 60-44-13, S. D. N. Y. (guilty plea entered April 30, 1941), brought under the obstruction of justice statute, lawyers for the Antitrust Division had requested permission to search certain files. After the search was in progress Ilgner and his agents destroyed some of the documents. Ilgner was indicted and pleaded guilty. I know of no other case which has been brought under the obstruction of justice statute resulting from an antitrust investigation but I don't pretend to have made an exhaustive search.

Judge Stanley H. Barnes, former chief of the Antitrust Division of the Department of Justice and now a respected judge in the Ninth Circuit, as Chief of Antitrust officially interpreted the statute as follows: "It is a violation . . . for a person after he or his corporation has been served with a subpoena duces tecum to alter, destroy or fail

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[28] 17. "He must obey his own conscience and not that of his client."

to produce documents called for by the subpoena if done with the intent of obstructing or impeding the Grand Jury investigation." There can be no question but this is a sound statement and it does no more than apply the holding in *Bosselmen* v. *U. S.*, 239 Fed. 82 (2d Cir.). However, Judge Barnes went on: "Moreover, it is the position of the Antitrust Division that this statute is violated if a person with intent to impede an investigation destroys or alters documents if he knows *or has reason to believe* that an FBI or Grand Jury investigation is in progress and that the investigator or the Grand Jury may later call upon him for the production of these documents.[29] (Emphasis supplied.)

Since the statute on its face speaks of obstructing the due administration of justice the question posed is when justice begins to be administered. I doubt whether the courts will go so far as did Judge Barnes and hold that mere knowledge that the Federal Bureau of Investigation may be interested in a corporation's records requires that the corporation preserve them, but I certainly would not advise my client to destroy papers under such ambiguous circumstances.

In our eagerness to defend our clients there is often a tendency, I feel, to forget that a government investigation is not quite the same thing as a Municipal Court action, and that perhaps higher standards are called for in dealing with counsel for the United States or with the United States investigators. The United States is rarely a pettifogging litigant, and its lawyers seek to enforce laws in the supposed interest of the nation, and not merely to line their pocketbooks. The private lawyer and his client have a duty imposed by statute not to impede this process, but I think they have the further duty imposed by pride in citizenship of dealing with the government in a candid and cooperative fashion.[30] This is not to say, however, that there is any obligation for lawyers to turn in their clients to the prosecutor or for anyone to preserve documents which may be incriminating on the long chance that the government may one day

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[29] Quoted by Van Cise in *Understanding the Antitrust Laws* (1953), pp. 131-32.

[30] I say this with full recognition that we live in a cynical period when these words sound naif and most reasonable men do not talk this way, and some Government lawyers seem to act in their own rather than the Nation's interest. On balance, it seems to me, a stronger complaint can be made against the deviousness of the private bar than against the intransigence of the Government lawyer. See Hoffmann, GOVERNMENT LAWYER, New York, 1955, pp. 119-133.

be interested in them. I think it fortunate that we have an adversary system and that malefactors great or small are given numerous chances to reform themselves without getting into formal proceedings which may send them to jail.

Certain records of course ought to be preserved and well kept since they can do nothing other than help the company when the antitrust sleuths begin to pound on the door. Records showing that your competitor is bigger than you are, sells more goods, has greater earnings and larger capitalization may always be useful to have around if the challenge is made that your conduct tends substantially to affect commerce. Records which show that you lowered your price in good faith to meet competition are essential in defense to a proceeding under Section 2(a) of the Clayton Act. The Federal Trade Commission, bowing to the Supreme Court decisions in the *Standard Oil of Indiana* case,[31] and the *Automatic Canteen* case,[32] stated to the Senate Interstate and Foreign Commerce Committee "the right to meet a market price which a competitor is offering to a customer, when this is done in good faith, is the very essence of a competitive economy." [33] In order to establish the good faith defense it is desirable to have as complete records as possible. If your salesman reports that the competitive company has quoted a lower price to the customer he should promptly make a memorandum of the fact, stating who told him, and reporting the price precisely. This memorandum should be sent to the home office and preserved particularly if your company follows the information by matching the quoted price. Some companies make an effort to procure from the customer copies of the competitor's price quotation. This, of course, is usually too much to ask of a customer and it is often as important to stay in business as it is to build evidence for antitrust cases. It is desirable also, when the salesman asks permission to match a competitive price, to send precise instructions to him which will indicate that he is to match the price and not undercut it. As you know, undercutting does not fall within the good faith defense. If you are confident about the character of the transactions in which you assert the

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[31] 340 U. S. 231.

[32] 346 U. S. 61.

[33] Howrey, "The Federal Trade Commission and the Attorney General's Committee Report," *Trade Regulations Series No. 3,* Federal Legal Publications, p. 116.

good faith defense it may be desirable to keep them segregated in separate folders containing the pricing quotations and the surrounding letters and memoranda so that they can readily be found by any government investigator.

It also may be well to preserve all lawyers' opinions about transactions since they may have some meaning when intent is in dispute. It seems unnecessary to say that these opinions, if addressed to legal matters, and if obtained pursuant to the attorney-client relationship, are privileged and need not be produced in response to any process nor shown on a voluntary investigation.[34]

Suppose that one of your company's employees who has failed to spend 15 years in study of the antitrust laws writes a letter to a superior which suggests that he is about to fix prices with a competitor or is about to lower your price in order to obtain some business without reference to meeting a competitive price. If the recipient of the letter has been sufficiently attuned to antitrust niceties he will promptly repudiate it in unambiguous terms, indicating that what the employee contemplates must be at once abandoned. Too often it is possible for unresponsible subordinates in the field, contrary to company policy, to prejudice the company's interests through engaging in isolated unauthorized transactions which are illegal under the antitrust laws. If the employee, however, is promptly told that the transaction must not be consummated or must be abandoned the record damage may be righted to the satisfaction of the government investigator.

I am not a strong believer in the institution of adult education because, although adult speakers depending upon their abilities can formulate precepts good, bad and indifferent, it is very hard for adult listeners to shape their conduct to follow the precepts they hear. We are all ridden by habit and nothing is more difficult than to break through a corporation's habits in doing business and to install new procedures merely because the corporation is told by counsel that a new way of doing business will be safer under the antitrust laws.

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[34] If they are shown the privilege is waived. *In re Associated Gas and Elec. Co.*, 59 F. Supp. 743, 744-5 (S. D. N. Y. 1944).

THE ANTI-MERGER LAW OF THE UNITED STATES: YESTERDAY, TODAY, TOMORROW (Part I)

by

JOHN P. VUKASIN, JR.*

Introduction

The anti-merger law of the United States is the result of more than 40 years of trial and error. An attempt will be made here to trace its growth and development, to discuss the statutory test of illegality imposed by the recent legislative amendment and to mention present activity in the field together with proposed amendments and modifications.

When firms or corporations reach such size that competition is endangered, that trade may be restrained, that monopoly becomes possible, Congress must enact corrective and preventive measures. This is the reasoning behind our anti-merger laws.

Mergers resulting in the growth of giant corporations, acquisitions tending toward concentration of economic power, consolidations effecting monopoly or restraint of trade are all evils to be avoided if our economic system is to prosper and remain healthy and strong. Free enterprise is one of the basic tenets of our democratic way of life; it must be preserved. When competition, the ever necessary companion of free enterprise, is endangered, steps must be taken to protect it, whether the threat arises from within or from without the economic system. When the danger comes from political or social sources, the electorate is vividly warned of the evils of too much governmental intervention in the economic sphere, and the burden of the ultimate course of action rests on the voter. When, on the other hand, competition is stifled or endangered by units within the free economy itself, it is the duty of our elected representatives to take adequate steps to enact remedial legislation, and to exert the proper pressures necessary to protect us from ourselves. One of the legislative avenues of approach to the problem has been to

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enact anti-merger laws, statutes aimed at preventing harmful and dangerous combinations.

The Clayton Act: The Original Anti-Merger Law

Our nation has experienced three periods during which industrial concentration increased with uncommon rapidity within the last sixty-five years. The first of these occurred roughly from 1890 to 1907[1] and witnessed the creation of many of this country's largest corporations.[2] The natural competitive desires to accumulate greater working capital, to acquire a larger share of a particular market, and to achieve a more secure position of strength within that market, all led toward greater acceleration of each merger movement.[3]

Virtually all of these business activities took place as a merger, consolidation or acquisition, or occurred as a result of the creation of a holding company. Although each of these terms has its own concise and particular meaning and refers to a technically different kind of business combination,[4] they will be used interchangeably in this paper, in their generic sense, to denote the creation of one firm out of two or more smaller firms.

Because of this trend of business activity, there arose a concern over the maintenance of competition and also an awareness of large amounts of "watering of stock." This process of "watering" was lucidly described by the Temporary National Economic Committee:[5]

> It was standard procedure for the promoter to negotiate with a number of enterprises in the industry and reach a purchase price for each property. The new enterprise would be formed, with extensive capitalization of the alleged benefits of consolidation. The original owners would be paid in cash or stock, and the promoter and the banks would obtain the remainder. It

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1 F. T. C. *Report on Corporate Mergers and Acquisitions,* H. R. Doc. No. 169, 84th Cong., 1st Sess. 145 (1955).

2 F. T. C., The Merger Movement, at 23-4 (1948).

3 One description of the period went thusly: "The sensational progress of the . . . movement was possible only because a group of shrewd, plausible, and aggressive promoters was at hand to make fullest use of the favorable business situation." Seager and Gullick, Trust and Corporation Problems, 64 (1929).

4 Ballantine, Corporations 664 (rev. ed. 1946).

5 Temporary National Economic Committee, Monograph No. 27 The Structure of Industry 231 (1941).

was regularly true that the whole was greater than the sum of its parts.

As a result of this course of business action and its accompanying rapid rise of giant corporations and tendency toward concentration of economic power, Congress enacted three basic pieces of legislation aimed at preserving and maintaining competition. The first of these was the Sherman Act,[6] enacted in 1890 with only one dissenting vote, which was a reaction to the early pools and trusts,[7] and which was aimed primarily at the prevention of "every contract, combination . . . or conspiracy in restraint of trade," and the punishment of persons who "monopolize, or attempt . . . combine or conspire . . . to monopolize . . . trade or commerce."

Twenty-four years later, Congress supplemented the Sherman Act with the Federal Trade Commission Act[8] which created the F. T. C. and defined its powers and duties; and the Clayton Act[9] which was intended to reach effects beyond those prohibited by the Sherman Act. This was to be effected primarily by prohibiting price discrimination, exclusive dealer contracts, stock acquisitions and interlocking directorates when their effect would be to substantially lessen competition or to tend to create a monopoly. The framers of this statute intended that it supplement the Sherman Act by preventing restraint of trade at an earlier stage. This is evidence by a Senate Committee report which stated:[10]

> The bill . . . seeks to prohibit and make unlawful certain trade practices, which . . . are not covered by the Sherman Act . . . and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consumation. . . .

These three acts are the core of the Federal Government's antitrust laws, and their general objective is promotion of competition in open

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[6] 26 Stat. 209 (1890), 15 U. S. C. 1-7 (1952).

[7] *F. T. C., Report on Corporate Mergers and Acquisitions,* H. R. Doc. No. 169, 84th Cong., 1st Sess. 1 (1955).

[8] 38 Stat. 717 (1914), 15 U. S. C. 41-51 (1952).

[9] 38 Stat. 730 (1914), 15 U. S. C. 19-27 (1952).

[10] S. Rep. No. 698, 63rd Cong., 2nd Sess. 1 (1914).

markets,[11] for competition is "desirable on principle and for its own sake, like political liberty and because political liberty is jeopardized if economic power drifts into relatively few hands." [12]

Section 7 of the Clayton Act was concerned with preventing continuation of the merger movement. The heart of the original anti-merger statute prohibited the acquisition of[13]

> . . . The whole or any part of the stock . . . of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, . . . or to restrain such commerce in any section or community, or to tend to create a monopoly. . . .

Acquisitions of stock of two or more corporations were similarly prohibited when the effect "may be to substantially lessen competition between such corporations."

The scope of the original section was clearly limited. It referred only to an acquisition *by* a corporation, thus excluding from its range such action by any other form of business enterprise (*e.g.*, partnership, sole proprietorship, *etc.*). Similarly, it was effective only when the acquired firm was also a corporation; and then only when the transaction took the form of an acquisition of *stock* (or other share capital). However, any stock acquisition came within the purview of the act regardless of whether the whole or merely a part of the stock was acquired. Indirect, as well as direct acquisitions of stock were covered.

The section specifically did not apply to purchases of stock solely for investment rather than voting purposes, nor did it apply to the formation of subsidiary firms created for lawful purposes. In addition, common carriers were excluded from its prohibitions in many respects.

The business activity proscribed by the statute would be prohibited only when one of the following three tests were met: when the effect of such acquisition may be to: 1) substantially lessen competition

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11 Report of the Attorney General's National Committee to Study the Antitrust Laws, 1 (1955).

12 Id. at 2.

13 15 U. S. C. 18 (1914).

between the acquired and the acquiring corporations, 2) restrain commerce in any section or community, or 3) tend to create a monopoly of any line of commerce.

It was not long before defects began to appear and dissatisfaction and concern over its imperfections manifested itself in many ways.

The most obvious shortcoming, and the one which provoked the greatest comment was its restriction to mergers consummated only in the form of stock acquisitions, thereby leaving open the obvious loophole of achieving the desired merger by acquisition of assets. The best discussion of how this seemingly absurd situation arose, is found in the Report from the Committee on the Judiciary of the House of Representatives, accompanying the 1950 amendment to section 7, which said in part:[14]

> The present impotence of section 7 raises the question as to why Congress, in granting the Federal Trade Commission power to prevent purchases of stock, did not also give it power to move against acquisitions of assets. Inasmuch as purchases of assets are more binding and lasting, and thus more destructive of competition, this omission seems particularly paradoxical, the answer lies in the fact that at the time when Congress enacted the Clayton Act, most acquisitions took the form of stock purchases. By comparison, acquisitions of assets were relatively unimportant.
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> The economic background behind the passage of the Clayton Act . . . was the great merger movement which began at the very end of the nineteenth century and extended through 1907. During this period . . . most mergers were effected through the purchase of stock.

Justice Stone's dissenting opinion in *Arrow-Hart and Hegeman Co. v. F. T. C.*[15] clearly supported the proposition that acquisition of stock was the usual and prevalent method of absorbing competitors, when he said:[16]

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14 H. R. Rep. No. 1191, 81st Cong., 1st Sess. 4 (1949).

15 *Arrow-Hart and Hegeman* v. *F. T. C.*, 291 U. S. 587 (1934).

16 Id. at 601 (referring to ftnt. 17).

> Only in rare instances would there be hope of a successful merger of independently owned corporations by securing the consent of their stockholders in advance of the acquisition of a working stock control of them. Hence the establishment of such control by the purchase or pooling of the voting stock . . . is the normal first step toward consolidation.

The basic weakness of the original section 7 was accented by the Supreme Court in 1926[17] when it declared that the F. T. C. does not have the power under section 7 to order the defendant corporation to divest itself of a competitor's *property* even though the property was acquired by means of an illegal purchase of the competitor's *stock*. In 1934, the enforcement of the Clayton Act was further weakened when the Supreme Court ruled that the acquired corporation could be dissolved even after the filing of a complaint by the F. T. C.[18] In other words, despite the working of section 7, the F. T. C. lacked power to order divestiture of physical assets that had been acquired *by means of an illegal stock purchase*. Thus, timely action by the acquiring corporation could result in every case, in avoiding the prohibitions of the section.

One interpretation of section 7, as enacted in 1914, would have resulted in a prohibition of all mergers between competitors, on the grounds that any such merger would automatically reduce competition between them. Indeed, at first glance, this seems to be the precise meaning of that clause. The courts, however, interpreted the clause to establish as the test, the effect of the merger on the entire industry.[19] This construction of the statute, rendered it indistinguishable from the Sherman Act test and thus rendered it ineffective as a preventative measure.[20]

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17 *F. T. C.* v. *Western Meat Co.*, 272 U. S. 554 (1926).

18 *Arrow-Hart and Hegeman* v. *F. T. C.*, 291 U. S. 587 (1934).

19 *International Shoe Co.* v. *F. T. C.*, 280 U. S. 291 (1930); *V. Vivandan Inc.* v. *F. T. C.*, 54 F. 2d 273 (2nd Cir. 1931); *Aluminum Co. of America* v. *F. T. C.*, 284 F. 401 (3rd Cir. 1922), *cert. denied*, 261 U.S. 616 (1923); *U. S.* v. *Republic Steel Corp.*, 11 F. Supp. 117 (N. D. Ohio 1935); Handler *Industrial Mergers and the Antitrust Laws*, 32 Colum. L. Rev. 179, 264 (1932); Comment, 39 Yale L. J. 1042, 1043 (1930); Note, 24 Ill. L. Rev. 908, 910 (1930).

20 F. T. C., *Report on Corporate Mergers and Acquisitions*, H. R. Doc. No. 169, 84th Cong., 1st Sess. 154 (1955); 32 Colum. L. Rev. 179, 264 (1932); 24 Ill. L. Rev. 908, 910 (1930); 39 Yale L. J. 1042, 1043 (1930).

That section 7 had failed in its avowed purpose, was further evidence by the T. N. E. C. when it found that there is a 50 percent chance that 75 percent of any product selected at random is produced by one of the four largest firms in the industry.[21]

Concentration of economic power continued, despite the Clayton Act. This was shown by the National Resources Committee when it stated that the ownership of corporate assets by the 200 largest non-banking corporations grew from about one-third of the total in 1909, to 48 percent in 1928, and to 54 percent in the early thirties.[22]

As these defects in the original section 7 appeared, there arose a rash of recommendations and attempts to remedy it. Since 1927, the F. T. C. has repeatedly noted in its annual report that acquisition of assets had replaced acquisition of stock as the primary method of effecting consolidation,[23] and has recommended amendment of section 7 so as to prohibit asset acquisitions in the same manner as stock acquisitions were then prohibited.

The T. N. E. C. Preliminary Report of 1939 declared such an amendment to be desirable because section 7 as it then existed had proven ineffective in curbing the evils which it had been created to prevent.[24] It further recommended an amendment changing the coverage of the act from acquisition of stock of *two* or more corporations to *one* or more corporations.[25]

In its Final Report, submitted in 1941,[26] the T. N. E. C. not only repeated its prior recommendation that asset acquisitions be included within the scope of section 7, but went a step further and proposed that:[27]

> The F. T. C. be given authority . . . to forbid the acquisition of the assets and property of competing corporations of over a certain size unless it be made to appear that the purpose and apparent effect of such a consolidation would be desirable.

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21 T. N. E. C., Mono. No. 27, 413-481 (1941).

22 National Resources Committee, The Structure of this American Economy 107 (1939).

23 Furthermore, in a special report in 1948 the F. T. C. reported that asset acquisitions represented almost 60% of the total number of all industrial acquisitions during the period 1939-1944. F. T. C., The Merger Movement: A Summary Report 6 (1948).

24 T. N. E. C., Preliminary Report, 21 (1939).

25 *Ibid.*

26 T. N. E. C., Final Report, 38-40 (1941).

27 *Id.* at 38.

The Commission further recommended:[28]

> . . . an outright prohibition on the acquisition of stock . . . of competing companies with suitable exceptions . . .

Following the T. N. E. C.'s Final Report, a number of bills were introduced in Congress which tend to indicate, from their purpose and scope, that the T. N. E. C. report was the motivating force behind them. All in all, 18 bills[29] were introduced in both Houses of Congress, before H.R. 2734, destined to become the 1950 amendment to section 7, was submitted.[30]

The Celler Act: The 1950 Amendment

The basic purpose of H.R. 2734 (also known as the Celler Bill) was to:[31]

> . . . limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy.

This avowed purpose was achieved by additions to, and deletions from, the basic structure and working of the original section 7. Some of the changes in the 1950 amendment were merely of a formal or technical nature, or were intended only for the purpose of making the terminology of the section more consonant with that used in other sections of the *United States Code*. This paper, however, will concern itself only with those changes which were intended to effect an organic and basic change in our anti-merger law.

The original section 7 prohibited stock acquisitions where the effect of such acquisition may be to: a) substantially lessen competition between the acquiring and acquired corporations; b) restrain such

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28 *Id.* at 39.

29 For a complete list of the bills, accompanying documents and debates which comprise the legislative history of the 1940 amendment to section 7, see footnote 4, 52 Colum. L. R. 766 (1952).

30 Apparently, the economic facts and figures presented before the Senate Committee on the Judiciary, indicating the high extent to which our economy has become concentrated in the hands of a few large corporations, were very influential in prompting that committee to send the bill to the floor with a "do pass" recommendation. S. Rep. No. 1775, 81st Cong., 2nd Sess. 3 (1950).

31 S. Rep. No. 1775, 81st Cong., 2nd Sess. 3 (1950).

commerce in any section or community; c) tend to create a monopoly of any line of commerce; or d) substantially lessen competition between two or more corporations whose stock is so acquired.

The 1950 amendment changed all this so that now the statute prohibits stock or asset acquisitions when the effect may be a) substantially to lessen competition in any line of commerce in any section of the country; or b) to tend to create a monopoly in any line of commerce in any section of the country.

The most obvious change enacted by the 1950 amendment was to include the acquisition of assets within the purview of section 7. Thus, the act now covers acquisition of assets as well as of stock; but it should be noted that the scope of the act differs, depending on whether the merger was by purchase of stock or assets.

Stock acquisitions are covered when executed by a "corporation engaged in commerce," whereas *asset* acquisitions are covered only when executed by a "corporation subject to the jurisdiction of the F. T. C." [32]

The acquisition need not be of the entire stock or assets of a corporation to come within the act. Purchase of a part of the corporation's stock or assets is enough. By analogy with judicial interpretation of the pre-1950 act,[33] we may conclude that an acquisition of assets, though not large enough volume-wise to constitute transfer of the major portion of the assets of the selling corporation, may very well come within the scope of the act since its amendment.

The statute covers indirect as well as direct acquisitions of stock or assets. Thus, it covers purchases by a "subsidiary or affiliate, or otherwise." [34]

The act also covers acquisition of assets (or stock) of methods other than purchase, as, for example, lease of assets.[35]

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[32] Paragraph six of Section 7 states: "Nothing contained in this section shall apply to authority actions duly consummated pursuant to authority given by Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the secretary of Agriculture under any statutory provision vesting such power in such Commission, secretary or Board.

[33] *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (1953).

[34] H. R. Rep. No. 1191, 81st Cong., 1st Sess. 9 (1949).

[35] H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949).

The scope and meaning of the tests of the 1950 amendment have been the subject of much discussion. It has been suggested that it is merely a re-enactment of the old section 7 test.[36] On the other hand, there is a line of argument which claims, that it lays down a test which is stricter than the Sherman Act test.[37] One author claims it is a

> . . . problem fraught with grave difficulties and perplexities, which if not speedily and correctly solved . . . may cast a paralyzing weight of uncertainty upon the economy . . .[38]

Let us inspect the new test of illegality section by section, in any line of commerce in any section of the country.

The 1914 Act prohibited the restraint of commerce "in any line of commerce in any section or community." The new law applies "in any line of commerce in any section of the country," thus omitting the word "community." The reason given for this deletion was that the act should not go "so far as to prevent any local enterprise in a small town from buying up another local enterprise in the same town."[39] The House Report accompanying the bill[40] merely states that the new wording is "less restrictive."

The exact definition intended by Congress when it used the "section of the country" test is not precisely clear.

It has been suggested that it does not refer to a geographic area, but rather to an area of competition, a market or trade area.[41] Naturally, if this is the test, the relative "section of the country" will vary from industry to industry.

Inserting this new test also appears to have overruled the decision in the *International Shoe* case, which held that the competition between the merging corporations must have composed a large share of the business of each of them. Now, the test is the effect on competition in the section of the country, even though it constitutes only a small portion of the business of each of the respective firms.

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36 52 Colum. L. Rev. 766, 771 (1952).
37 *Id.* at 772.
38 37 A. B. A. J. 253 (1951).
39 S. Rep. No. 1775, 81st Cong., 2nd Sess. 4 (1950).
40 H. R. Rep. No. 1191, 81st Cong., 1st Sess. 5, 6 (1949).
41 52 Colum. L. Rev. 766, 778 (1952).

The *Transamerica* case,[42] although decided under the pre-1950 section 7, may shed some light here. In that case the Third Circuit decided that the "market" in the banking field is the local community. Thus, foreclosing the possibility of prosecution for substantial lessening of competition "merely" because of Transamerica's acquisition of 48 banks, since 38 of them were in "one bank towns."

The Senate Report accompanying H.R. 2734 set forth certain broad standards that can be used to ascertain the pertinent "section of the country." [43] The relevant factors indicated were: a) the nature of the product, b) the area of effective competition, and c) what comprises an appreciable segment of the market.

The old test of illegality, referring to the lessening of competition between the acquiring and acquired corporations, was not repeated in the 1950 amendment. It its place Congress substituted a new test: whether "the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly . . . in any line of commerce in any section of the country." [44] Various reasons for this change have been suggested:

a) Application of the Sherman Act test to this part of section 7 had rendered it ineffective as a preventative measure.[45]

b) Strictly construed, the wording of the acquiring-acquired test would severely limit the scope of the section.[46]

c) It might be so construed as to prevent all acquisitions between competitors.[47]

Now, the acquiring-acquired test is no longer in effect, and in its stead, we find a test intended "on the one hand . . . to be more

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[42] *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163 (3rd Civ. 1953), *cert. denied* 346 U. S. 901 (1953).

[43] *Id.* at 5, 6.

[44] 15 U. S. C. 18 (1952).

[45] F. T. C. Report on Corporate Mergers and Acquisitions, H. R. Dok. No. 169, 84th Cong., 1st Sess. 145 (1955).

[46] *Ibid.* It escapes me how this problem of the narrow scope of the acquiring-acquired test could have been one of the main reasons for the change, in view of the opinion of Mr. Justice Sutherland in the International Shoe case, where he applied the Sherman Act test to the wording of the Clayton Act. *International Shoe Co.* v. *F. T. C.*, 280 U. S. 291 (1930).

[47] *Ibid.*

inclusive and stricter than that of the Sherman Act, on the other hand it was not desired that it go to the extreme of prohibiting all acquisitions between competing companies." [48]

The standards by which illegality is to be measured are, whether the effect of acquisition may be:

a) substantially to lessen competition, or

b) to tend to create a monopoly.

It should be noted that the aforementioned restrictive phrase "in any line of commerce in any section of the country" applies to both of these tests. The Senate Report said: [49]

> It is intended that acquisitions which substantially lessen competition, as well as those which tend to create a monopoly, will be unlawful if they have the specified effect in any line of commerce. . . .

The words "may be" were used to indicate that the statute would not apply to the "mere possibility" of the proscribed effects, but only to their "reasonable probability." [50] Furthermore, the "may be" phrase was retained from the original section 7 in order to continue the Congressional intent that the Clayton Act is to prevent restraints of trade in their incipiency, i.e., before they come within the purview of the Sherman Act.[51]

The exact meaning and interpretation of the "substantially to lessen competition" clause is difficult to ascertain with clarity.[52] Since this phrase replaced the acquiring-acquired test, it is known that it was not intended that the statute be restricted merely to acquisitions among competitors. Further, we know that the act applies to "all mergers and acquisitions, vertical and conglomerate as well as horizontal . . ." [53]

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[48] S. Rep. No. 1775, 81st Cong., 2nd Sess. 4 (1950).

[49] S. Rep. No. 1775, 81st Cong., 2nd Sess. 5 (1950).

[50] *Id.* at 6.

[51] S. Rep. No. 1775, 81st Cong., 2nd Sess. 6 (1950).

[52] It has been indicated that the test must, of necessity, be couched in vague, general terms due to the complexity and constantly changing nature of the phenomenon known as competition. ftnt. #1—p. 171.

[53] H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949).

The Senate Report made it clear that the 1950 amendment was not intended to revert to the Sherman Act test.[54]

> The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.

The House Report agreed with this view when it stated that H.R. 2734 was not intended to be a "mere reenactment" of the Sherman Act prohibitions.[55]

> These two tests of illegality found in the 1950 amendment are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act.

Unfortunately, it is not clear what test has been applied by the courts in interpreting the same langauge in other sections of the Clayton Act (*e.g.* section 3). In the *Standard Oil* case of 1949,[56] the Supreme Court approved a lower court opinion holding that competition had been or would be substantially lessened within the meaning of section 3. But the court did not indicate whether dollar volume, or percentage of market controlled, or whether both tests were applied to arrive at its decision. This points up the difficulty that the courts will have with any vague test, since they are not equipped to analyze complex economic factors.

Two other cases, decided under the old section 7, should also be kept in mind. In *Hamilton Watch Co.* v. *Benrus Watch Co.*,[57] it was held that the trial court had not abused its discretion in finding that control of Hamilton by Benrus would have been affective to substantially lessen competition in the jeweled watch field.[58] However, the basis of the decision was not clearly indicated.

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[54] *Id.* at 4, 5.

[55] H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949).

[56] *Standard Oil Co. of Calif.* v. *U. S.*, 337 U. S. 293 (1949).

[57] *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn. 1953).

[58] At the time, Benrus was ranked fourth and Hamilton was fifth, in the field of six major firms.

More help is gained from *Pillsbury Mills, Inc.*[59] where the F. T. C., upon reversing the trial examiner's dismissal of the complaint, clearly indicated that it was looking to the share of the market that would be controlled should the merger be consummated. The F. T. C. warned however, that each case requires careful examination of all relevant factors in order to ascertain the probable economic consequences, and that no one pattern of proof can be established that will suffice in every case.

> The House Report states that the act is[60] intended to permit intervention in . . . a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition

even though this effect may not be so far reaching as to amount to a violation of the Sherman Act. From this it follows that section 7 unlike the Sherman Act, requires findings and conclusions, not of anti-competitive effects, but merely of a reasonable probability of a substantial lessening of competition or tendency toward monopoly.

The Attorney General's Report of the National Committee to Study Laws lists four areas of consideration which may very well be of primary relevance in determining whether any particular merger will substantially lessen competition.[61]

1) The character of the acquiring and the acquired company.

2) The characteristics of the markets affected.

3) Immediate changes in size and competitive range of the acquiring company and in the adjustments of other companies operating in the markets directly affected.

4) Probable long range differences that the acquisition may make for companies actually or potentially operating in these markets.

The Attorney General himself has stated that eleven tests should be applied to ascertain the legality of a merger. These tests are:[62]

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59 *Pillsbury Mills, Inc.*, F. T. C. Dkt. 6000 (1953).

60 H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949).

61 Report of the Attorney General's National Committee to Study the Antitrust Law, 125 (1955).

62 For an analysis of these tests see 2 Howard L. J. 57, 67 (1956).

1. The location, physical and financial, size, past acquisitions, products and activities of the merging companies, individually and in combination.

2. The structure and size of the industry in terms of production and capacity.

3. The relative position in the industry of the two companies, individually and combined.

4. The ease by which new competitors may enter the industry.

5. The number of companies active in the industry, their respective size and relative standing in sales and total assets.

6. Sales, relative standing and like factors of the two companies and their competitors in definable market areas, if relevant.

7. The nature of the industry—that is, whether infant, static, dynamic or declining.

8. The effect the proposed merger may have on sources of raw materials and methods and patterns of distribution.

9. Whether the acquisition may result in a significant reduction in competition.

10. Whether the acquisition may increase the relative size of the purchasing company in such a fashion as to give it a very substantial advantage over its competitors.

11. Whether the relationships between the purchaser and other companies that may be brought about by the merger might result in a lessening of competition.

The Senate and House Committee Reports accompanying the Celler Act, indicate that the new test may lie somewhere between the old acquiring-acquired test on the one hand and the Sherman Act test on the other.[63] But just exactly where this new test lies is an elusive question. Only time, with its accompanying judicial decisions, can make the answer available.

(Article continued in next issue)

63 H. R. Rep. No. 1191, 81st Cong., 1st Sess. 6-8 (1949)

THE ROBINSON-PATMAN ACT AND THE ACCOUNTANT*

by

JERROLD G. VAN CISE**

The accountant in the discharge of his professional duties frequently comes upon disturbing indications that his client is engaging in price discrimination. On these occasions, it is reported, he is not always clear whether he should concern himself with this discrimination or whether, in view of the legal issues raised, he should rather pass by on the other side.

The objective of these pages is to outline, for the accountant, the legal issues raised by price discrimination and the nature of the role which he may play with respect thereto. First, there appears a general explanation of the manner in which an attorney analyzes discrimination in the light of the controlling provisions of the Robinson-Patman Act. Second, there follows a detailed discussion of how the attorney requires the assistance of the accountant to deal with the cost justification phase of this Robinson-Patman analysis. Finally, there are submitted a few practical suggestions with respect to the manner in which the two professions might discharge their respective cost justification roles.

GENERAL ANALYSIS

Statutory Provisions

An attorney who undertakes to analyze an alleged discrimination in the light of the Robinson-Patman Act must, of course, initially study the statutory requirements of that Act.

Section 1(a) of that Act (known also as Section 2(a) of the Clayton Act) provides, in part:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or in-

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directly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *"[1]

Upon study of these provisions, the attorney finds that the Act in essence forbids a discrimination where the following three facts exist:

(1) A discrimination in price,

(2) Between purchasers of commodities of like grade and quality,

(3) Where the effect may be substantially to lessen competition, tend to create a monopoly or injure competition with any person.

Sections 1(a) and (b) of the Robinson-Patman Act further contain certain provisos qualifying the above prohibition of discrimination. Quotation of these provisos here is unnecessary. It is enough to say that the attorney, following a study of these qualifying provisos, finds that a forbidden discrimination is nevertheless permitted by the statute where any one of the following three affirmative justifications is established:

(1) The discriminatory lower price is in response to changing conditions affecting the market for or marketability of the commodities involved,

(2) The discriminatory lower price is made in good faith to meet an equally low price of a competitor, or

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[1] 49 Stat. 1526 (1936), 15 U. S. C. §13 (1952).

(3) The discriminatory lower price makes only due allowance for specified cost differences.

The attorney necessarily concludes, from this review of the Robinson-Patman Act, that to determine whether an alleged discrimination is in violation of that Act he must resolve three negative and three affirmative issues. First, the Act requires him to determine whether any one of the three facts essential to establish an unlawful discrimination is *not* present. If any one of these facts is absent, there exists no unlawful discrimination. Second, the Act instructs him further to determine if any one of the three affirmative justifications for such a discrimination *is* present. If so, the otherwise unlawful discrimination becomes lawful. Finally, he then, in addition, mentally notes that there are certain other statutory provisions of limited application which may also require his attention, but he usually sets these to one side until the aforesaid six major factual issues have been reviewed.

The attorney, thus enlightened by this analysis of the Robinson-Patman Act, thereafter proceeds to apply his study of the law to the specific discrimination that he is to review as follows:

Negative Issues

The attorney initially takes steps to resolve the negative issues of whether one or more of the three facts essential to establish an unlawful discrimination are not present. If he finds that any one of these facts is missing, he knows that the discrimination that he is considering is not forbidden by the Act.

First, he checks to see whether the discrimination under review is or is not a "discrimination in price." Thus, if he finds that his client is selling at different gross prices but, in fact, at the same net prices, he may conclude that "discrimination" is not present.[2] Again, if he determines that his client is discriminating in some manner other than in price, as, *e.g.*, by selling to a few retailers but not to others, he may decide that any discrimination involved at least is not discrimination "in price." [3]

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[2] "A discrimination is more than a mere difference"—Congressman Utterback (80 Cong. Rec. 9416 (1936)).

[3] *Klein* v. *Lionel Corp.*, 237 F. 2d 13 (3d Cir. 1956); *Bird & Son, Inc.*, 25 F. T. C. 548 (1937).

Second, he looks to see whether the discrimination under review is or is not between "purchasers of commodities of like grade and quality." Should he determine that the persons involved do not buy directly from his client, and are not controlled by his client in buying indirectly through his client's customers, he may conclude that such persons are not "purchasers." [4] In the event that he finds any discrimination between purchasers to be in a price charged for services (which are not ancillary to any sale of a commodity), *e.g.,* for the transportation of passengers,[5] he may decide that the discrimination is not between purchasers of "commodities." And should the discrimination consist in charging a lower price for an inferior grade of gloves and a higher price for a superior grade of this commodity,[6] he may properly conclude that there is no unlawful discrimination in the sale of commodities of "like grade and quality."

Third, he then scrutinizes the discrimination for any indication that its effect may be to "injure competition." Many price differences are so small that they could have little or no effect on "competition." [7] Other differences might "injure" competition if they discriminate between competing buyers[8] but not if they solely affect competing sellers.[9] And still others, such as functional prices giving a lower price to wholesalers than to retailers,[10] actually promote competition.

Affirmative Issues

If the attorney finds that each fact essential to establish an unlawful discrimination is present, he realizes that the discrimination under review is *prima facie* unlawful. He then seeks to determine

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[4] Compare *Whitaker Cable Corp.*, F. T. C. Dkt. No. 5722 (1955), aff'd, 239 F. 2d 253 (7th Cir. 1956), cert. denied, 353 U. S. 938 (1957), with *Kraft-Phenix Corp.*, 25 F. T. C. 537 (1937).

[5] *Fleetway, Inc.* v. *Public Service Interstate Transp. Co.*, 72 F. 2d 761 (3d Cir. 1934), cert. denied, 293 U. S. 626 (1935).

[6] *Boss Mfg. Co.* v. *Payne Glove Co.*, 71 F. 2d 768 (8th Cir. 1934), cert. denied, 293 U. S. 590 (1934).

[7] See *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, 155 (7th Cir. 1956), and *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253, 255-56 (7th Cir. 1956), cert. denied, 353 U. S. 938 (1957).

[8] *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948).

[9] *Yale and Towne Mfg. Co.*, F. T. C. Dkt. No. 6232 (1956); *General Foods Corp.*, 50 F. T. C. 885 (1954).

[10] See cases collected in Van Cise, *How to Quote Functional Prices*, HOW TO COMPLY WITH ROBINSON-PATMAN ACT (CCH 1957 Antitrust Law Symposium) 80, 95-102.

whether or not one of the Act's three affirmative defenses justifies the discrimination.

First, he reviews the facts to see whether by chance his client has sold at a lower price to some customers than to others in response to "changing conditions" affecting either the market for or the marketability of the commodities involved. For example, his client may have differentiated in price in order to enable his customers to buy, at their election, either on a short term or on a long term basis.[11] Or his client may have found it necessary to dispose of distress merchandise to a few of its customers in bona fide transactions at special distress prices.[12] In either case he may conclude that any discrimination would be justified by the differing market "conditions" of the respective sales.

Second, he checks the facts to see whether his client "in good faith" has sold at a lower price to some than to others in order to "meet an equally low price" of a competitor. His client may have done so in order to meet competition for the trade in a particular area[13] or for particular customers.[14] In either event, if his client is acting "in good faith" to "meet" and not to beat competitive pricing,[15] the price discrimination would be affirmatively justified.

Third, he analyzes the facts to determine whether or not his client has sold at a lower price to some than to others in order to make "only due allowance" for differences in the cost of selling and delivering to these customers. He soon realizes, however, that at this point he is over his head in a sea of figures and, if he is well advised, urgently calls upon an accountant to throw out a statistical lifeline. It is here that the role of the accountant with respect to price discrimination commences, as more particularly discussed below.

After this examination of the key provisions of Sections 1(a) and (b) the attorney must also consider certain other portions of the Robinson-Patman Act of less general applicability which may affect

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11 See *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1 (7th Cir. 1949).

12 See *Moore* v. *Mead Service Co.*, 190 F. 2d 540 (10th Cir. 1951), cert. denied, 342 U. S. 902 (1952).

13 *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (9th Cir. 1955), cert. denied, 350 U. S. 991 (1956), rehearing denied, 351 U. S. 928 (1956).

14 *Standard Oil Co. of Ind.* v. *Federal Trade Commission*, 340 U. S. 231 (1951).

15 *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945).

his client. For example, if the discrimination is local he considers whether it is possibly exempt from the Act because not involving interstate commerce,[16] or, if he represents a buyer, he considers whether proof of lack of knowledge of the illegality of a discrimination received may not save that buyer.[17] On the other hand, he may be concerned by the possibility that sales were made at "unreasonably low prices" for the purpose of eliminating a competitor, which may be unlawful under Section 3 of the Robinson-Patman Act even though no discrimination is involved.[18] Furthermore, what he believes to be a simple price discrimination problem may, on further analysis, turn out to be in fact an allowance in lieu of brokerage or an advertising or promotional allowance, all of which are subject to different tests under Sections 2(c) and 2(d).[19]

If this last despairing search into the encircling provisions of the Robinson-Patman Act reveals no opening through which the discrimination may escape, the attorney has, of course, no alternative but to prepare himself for the ordeal of advising his client that the discrimination is caught and condemned by that Act. For this purpose he fortifies himself with a quick look at the public and private procedures for the enforcement of the Act, and discovers that the discrimination may entail investigation, litigation, orders to cease and desist,[20] treble damages[21] and—in certain extreme situations[22]—fines and jail.[23] He thereupon as tactfully as possible submits his adverse legal opinion to his client and preaches a sermon of antitrust compliance in which the conscientious desire of his client to attain antitrust perfection is strengthened by realistic fears of antitrust purgatory.

Fortunately, the attorney in many instances discovers that one or more of the various major or minor tests for determining Robinson-Patman validity does in fact apply to, and authorizes, the discrimina-

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16 But cf. *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115 (1954).

17 *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61 (1953).

18 *Nashville Milk Co.* v. *Carnation Co.*, 18 CCH Sup. Ct. Bull. 393 (1958).

19 49 STAT. 1527 (1936), 15 U. S. C. §13(c) (1952); 49 STAT. 1527 (1936), 15 U. S. C. §13(d) (1952).

20 38 STAT. 734 (1914), 15 U. S. C. §21 (1952).

21 38 STAT. 731 (1914), 15 U. S. C. §15 (1952).

22 Department of Justice press release dated December 7, 1957 respecting the entry of a consent judgment in *United States* v. *Safeway Stores, Inc.* (N. D. Tex.).

23 49 STAT. 1528 (1936); 15 U. S. C. §13a (1952).

tion under review. Many reasonable forms of price differences are, of course, permitted by the Act. In that event he joyfully seeks out his client, conveys the good news, and is duly congratulated for having finally come up—for a change—with an affirmative answer.

Cost Justification

Statutory Provisions

Our attorney in his analysis of the three affirmative justifications for price discrimination, we have seen, will often at some point need to determine whether or not the cost savings proviso of the Robinson-Patman Act authorizes the discrimination under review.

This proviso, in effect, declares that a seller may charge a lower price to some customers than to other customers where the differential between these prices makes:

> "* * * only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." [24]

The attorney upon study of this proviso, we have mentioned, soon realizes that he cannot—unaided—determine whether or not this cost savings proviso sanctions the discrimination under review. For the statutory language, in substance, requires him to apply to the discrimination a composite mix of legal and accounting principles to three challenging tasks:

First, he must discover which costs of manufacture, sale or delivery, if any, differ as the result of differing methods or quantities of sale or delivery;

Second, he must then discover the extent to which these costs of manufacture, sale or delivery differ with differing methods or quantities of sale or delivery; and

Third, he must thereupon compare any difference in price (given by reason of the differing methods or quantities of sale or delivery) with the difference in costs (resulting from these differing methods

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[24] 49 Stat. 1526 (1936); 15 U. S. C. §13 (1952).

or quantities of sale or delivery), in order to determine whether or not the price differential makes only due allowance for the cost differential.

The attorney, accordingly, upon reflection, usually defers his determination as to whether the cost savings proviso justifies the discrimination at issue until he is joined by an accountant. In the processing of the three stage analysis above outlined, two heads are clearly better than one. To paraphrase a famous legal maxim, the attorney who seeks to be his own accountant, in such a Robinson-Patman analysis, has a fool for a client.

The attorney and the accountant will, of course, begin their joint study of cost justification with the actual needs of their client in mind. These needs will tend to channelize the type of investigation that they make and prevent them from coming up with a mere academic dissertation exhibiting professional ingenuity but lacking practical utility. Nevertheless, it is important that the form in which their assignment is presented to them should not dull their alertness to the existence of other cost factors not specified (and possibly now known) by their client which may be of equal relevance to their study. For example, the cost differences which the client has in mind as justifying a possible differential may be more than counterbalanced by other cost differentials that work in the opposite direction.[25]

Frequently, moreover, the team will find it advisable to make a preliminary study to determine whether there is a reasonable likelihood that any price differential can be cost justified, before they recommend as being worth while the more elaborate, detailed and expensive study needed to prove the cost savings defense to the satisfaction of a potential court or hearing examiner.[26]

Once these preliminary phases of their work are concluded, however, the attorney and the accountant will proceed step by step to make the definitive cost study required by the statutory cost proviso. The order in which the attorney and accountant eventually proceed in determining whether the price discrimination is justified by the cost savings proviso, needless to say, is a matter to be determined

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[25] Dawkins, *Quantity and Cumulative Volume Discounts*, Lectures on Federal Antitrust Laws (Summer Institute, U. of Mich. Law School 1953) 109, 112.

[26] Taylor, *How to Cost Justify*, How to Comply with Robinson-Patman Act (CCH 1957 Antitrust Law Symposium) 115, 121.

by the individual experience and prejudices of those parties. Whatever the order that they follow, however, the attorney and accountant will apply their complementary skills to the three stage requirements of the cost justification project substantially as follows:

Cost Segregation

The attorney and accountant in the course of their work proceed at some point to segregate, from all other costs of the business organization involved, those costs of manufacture, sale and delivery which differ as the result of differing methods and quantities of sale and delivery.

To achieve this segregation the legal and accounting co-workers initially define what they mean by "cost." Both lawyers[27] and accountants[28] recognize that words used in a statute may have special meanings which differ from their usage in other statutes. For this reason, for example, "cost" possibly may not in every Robinson-Patman proceeding mean "cost" as this term is customarily defined by accountants, but may on occasion embrace "cost" (including a return on investment) as that term is used[29] by economists. "Cost" under the Robinson-Patman Act will not, however, mean "marginal" or "incremental" costs, such as an economist will often refer to, because the savings which result from additional volume of production should be shared pro rata among all those who contribute to that volume and not be given entirely to the person who happens to be the latest purchaser.[30]

The attorney and accountant next identify those costs, so defined, which differ when "methods or quantities" of sale or delivery differ. Costs which do not differ with such differing methods and quantities are disregarded.[31] In addition, difficult questions as to certain of such costs are resolved, *e.g.*, whether costs of production differ with

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27 *United States* v. *Cooper Corp.*, 312 U. S. 600 (1941) ("person").

28 Hills, THE LAW OF ACCOUNTING AND FINANCIAL STATEMENTS, at 190 (1957) ("cost").

29 Due, INTERMEDIATE ECONOMIC ANALYSIS, at 179-81 (1950).

30 ADVISORY COMMITTEE ON COST JUSTIFICATION, REPORT TO THE FEDERAL TRADE COMMISSION (1956).

31 *Standard Oil Co. of Ind.*, 41 F. T. C. 263, 277-78 (1945) and 43 F. T. C. 56 (1946), modified, 173 F. 2d 210 (7th Cir. 1949), and rev'd on other grounds, 340 U. S. 231 (1951).

a method of delivery when orders are placed with a low cost rather than with a high cost plant.

The joint team then ultimately segregates those costs which so differ with such differing methods and quantities, from the other costs of the business organization. Where the former are direct costs, this, or course, is not difficult. Where the former are indirect costs, however, they may only be isolated through the use of functional groupings, time studies, sampling and other accounting techniques.[32] Mere estimates[33] and past company procedures[34] for such segregation—unsupported by any factual basis justifying their use[35]—are unreliable tools for this purpose and should not be employed. On the other hand, the fact that certain costs may be "intangible"—the cost of collecting bills and credit activities, for example—does not necessarily disqualify them.[36]

Cost Allocation

The attorney and accountant not only segregate, but at some point proceed to allocate to specific products and groups of customers, the costs thus found to differ with differing methods and quantities of sale and delivery.

To do so they are required, of course, to decide what product or groups of products are to be considered as being sold and delivered by means of varying methods and in varying quantities. Usually they select a particular product as the subject of their study. On occasion, however, it is proper for them to compare the costs of complete lines of products.[37]

They also decide what customer or groups of customers are to be considered as being sold and delivered by means of those varying methods and quantities. Customers need not be considered indi-

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32 Advisory Committee on Cost Justification, Report to the Federal Trade Commission (1956).

33 *Champion Spark Plug Co.*, 50 F. T. C. 30, 43 (1953).

34 *Standard Brands, Inc.*, 29 F. T. C. 121 (1939), 30 F. T. C. 1117 (1940), 46 F. T. C. 1485 (1950), aff'd, 189 F. 2d 510 (2d Cir. 1951).

35 *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61, 68 (1953).

36 *Reid* v. *Harper & Bros.*, 235 F. 2d 420 (2d Cir. 1956), cert. denied, 352 U. S. 952 (1956).

37 *Sylvania Electric Products, Inc.*, F. T. C. Dkt. No. 5728 (1954).

vidually but may be divided into reasonable categories.[38] Care must be taken, however, that substantially all customers taking in the same manner or quantities are placed in the same category, for otherwise purchasers lumped together indiscriminately with unlike purchasers may have costs allocated to them which they do not in fact incur.[39] For example, it is not permissible to take one large retailer of groceries and compare the costs of serving it with the costs of serving all other customers, large, small and medium.[40] Furthermore, it has been said that quantity classifications are only lawful so long as the divisions into brackets are made at breaking points which do not have a substantial anti-competitive effect and so long as the brackets are not unduly broad and the differentials not unduly great.[41]

The team of the two professions then allocates those costs which differ with differing methods and quantities of sale and delivery among the product and customer groups thus selected by them. Once more direct costs can readily be so allocated, but indirect costs can only be so apportioned by functional groupings, time studies, sampling and comparable accounting procedures. Any allocation of costs based upon arbitrary assumptions, *e.g.*, that each customer receives substantially the same number of salesman's calls,[42] or that all salesmen's calls last the same time[43] or that costs necessarily vary with dollar sales,[44] must not be attempted. Similarly, any allocation of costs to some and not to other products and customers equally sharing in those costs must be avoided.[45]

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[38] *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 59 (8th Cir. 1951), reversing 87 F. Supp. 484 (W. D. Ark. 1949); but cf. *Bruce's Juices, Inc.* v. *American Can Co.*, 87 F. Supp. 985 (S. D. Fla. 1949), aff'd, 187 F. 2d 919 (5th Cir. 1951).

[39] *Standard Oil Co. of Ind.*, 41 F. T. C. 263 (1945) and 43 F. T. C. 56 (1946), modified, 173 F. 2d 210 (7th Cir. 1949), and rev'd on other grounds, 340 U. S. 231 (1951).

[40] *International Salt Co.*, 49 F. T. C. 138, 154 (1952).

[41] *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351 (1948), rev'd on other grounds, 191 F. 2d 786 (7th Cir. 1951), cert. dismissed, 344 U. S. 206 (1952).

[42] *C. E. Niehoff & Co.*, F. T. C. Dkt. No. 5768 (1955), modified, 241 F. 2d 37 (7th Cir. 1957), cert. granted, 353 U. S. 982 (1957).

[43] *Standard Brands, Inc.*, 29 F. T. C. 121 (1939), 30 F. T. C. 1117, 1153 (1940), 46 F. T. C. 1485 (1950), aff'd, 189 F. 2d 510 (2d Cir. 1951); *International Salt Co.*, 49 F. T. C. 138, 155 (1952).

[44] *Curtiss Candy Co.*, 44 F. T. C. 237, 267-68 (1947).

[45] *Goodyear Tire & Rubber Co.*, 22 F. T. C. 232, 289 (1936).

Cost Evaluation

Ultimately, of course, the attorney and the accountant are forced to evaluate the extent to which the difference in price represented by the discrimination under review is justified by the costs which have been segregated and allocated as above described.

At this stage of their cost project they initially define what is meant by "price." Does the term mean f.o.b. mill, mill net or a delivered price?[46] Is it a net price after cash and other discounts, or is it a gross price?[47] And how do you price a line of products?[48]

They next compare the difference in the price, thus defined, of the discrimination under review, with the above segregated and allocated costs. That is to say, the price difference of the selected product or products, when sold and delivered to the selected customer or groups of customers, is compared with the segregated and allocated costs of such product or products when thus sold and delivered.

The members of the two professions, thereupon, proceed to evaluate the results of this comparison, in order to determine whether the differences in price under review make "only due allowance" for the segregated and allocated costs. They must decide, as a matter of fact, whether the price differential is less than, equal to or more than the cost differential. They must then determine, as a matter of judgment, whether the price differential so compared is justified by those costs. In this evaluation a rule of reason must be employed,[49] and where the price differential seems in good faith to be justified by the cost differential,[50] any *de minimis* failure of minor items to be cost justified may be safely disregarded.[51]

In summary, the task force of an attorney and an accountant proceeds to "segregate," to "allocate" and to "evaluate," when they analyze an alleged price discrimination in the light of the cost proviso

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[46] See, e.g., *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 721-26 (1948).

[47] See *Sylvania Electric Products, Inc.*, F. T. C. Dkt. No. 5728 (1954) (concurring opinion of Chairman Howrey).

[48] *Ibid.*

[49] ADVISORY COMMITTEE ON COST JUSTIFICATION, REPORT TO THE FEDERAL TRADE COMMISSION (1956).

[50] *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351, 394 (1948), rev'd on other grounds, 191 F. 2d 786 (7th Cir. 1951), cert. dismissed, 344 U. S. 206 (1952).

[51] *B. F. Goodrich Co.*, 50 F. T. C. 622 (1954).

of the Robinson-Patman Act. In each of these three stages of cost justification there abide complex issues of fact, law and accounting: but in the third lies the greatest of these tasks. For in evaluating whether or not a discrimination under review makes only due allowance for segregated and allocated costs, the joint team must weigh impersonal cost figures on the scale of personal judgment. In Robinson-Patman Act accounting, figures don't lie; but men of good will can and do disagree widely when they figure. These disagreements may only be resolved by mutual recognition that the purpose of the cost savings proviso is to permit the passing on of the economies of mass production and low cost distribution,[52] and by mutual cooperation to ensure that all price differences genuinely conducive to achieving that objective[53] are accorded full faith and credit by the Federal Trade Commission and the courts.

Practical Suggestions

Intelligent Cooperation

The Robinson-Patman Act, it is clear, by the terms of its cost savings proviso calls for the marriage of the two professions of law and accounting; and no attorney who deals with price discrimination may lightly seek to avoid this marital status. How the parties to such a union arrange the details of their professional housekeeping will, of course, vary from happy couple to happy couple. As marital counsellor, however, the writer respectfully offers to the reader the following four practical suggestions for a successful professional life together under the hospitable roof of this Act:

The first and most obvious suggestion is that each member of this professional team should seek earnestly to understand—but as carefully refrain from usurping—the role of the other. The attorney who naively believes that cost accounting is an exact science which can produce answers with mathematical certainty should read a few basic

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[52] *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61, 72 n. 11 (1953).

[53] Subject, of course, to possible quantity limit rulings of the Federal Trade Commission. Cf. *Federal Trade Commission* v. *B. F. Goodrich Co.*, 242 F. 2d 31 (D. C. Cir. 1957).

accounting treatises.[54] Similarly, the accountant who assumes that in the field of antitrust there is necessarily a rule of law and not of men might look at some elementary antitrust publications.[55]

Their division of work, of course, will vary depending upon the necessities of the particular cost justification project. Preferably, the attorney should retain the accountant so that the latter's work may become part of the attorney's "work product." [56] The attorney and accountant might then jointly plan their cost justification study, and thereafter proceed to put their plan into operation on the assumption that the primary responsibility of the accountant is to do the work and that of the attorney is to be the armchair critic. Only the accountant has the skill permitting him to find and compile the essential statistics, and only the attorney—under these circumstances—has the critical detachment and knowledge of legal theory needed for the careful review of these statistics.

Good Faith

An equally obvious suggestion is that this cooperation between attorney and accountant should be built upon the solid rock of professional integrity. The Commission[57] and the courts[58] have repeatedly stressed that what they seek is not so much perfection as it is good faith.

The attorney and the accountant, however, must do more than profess good faith. The burden is upon them to document the justifi-

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54 See, e.g., FEDERAL TRADE COMMISSION, CASE STUDIES IN DISTRIBUTION COST ACCOUNTING FOR MANUFACTURING AND WHOLESALING (H. R. Doc. No. 28), 77th CONG., 1st SESS. (1941); and Hills, THE LAW OF ACCOUNTING AND FINANCIAL STATEMENTS (1957).

55 See, e.g., REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955); and Van Cise, UNDERSTANDING THE ANTITRUST LAWS (PLI 1958).

56 Compare *Cold Metal Process Co.* v. *Aluminum Co. of Am.*, 7 F. R. D. 425 (N. D. Ohio 1947), aff'd, 167 F. 2d 570 (6th Cir. 1948), with *Cold Metal Process Co.* v. *Aluminum Co. of Am.*, 7 F. R. D. 684 (D. Mass. 1947), for conflicting holdings on privilege as to metallurgy experts.

57 *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351, 394 (1948), rev'd on other grounds, 191 F. 2d 786 (7th Cir. 1951), cert. dismissed, 344 U. S. 206 (1952); *Sylvania Electric Products, Inc.*, F. T. C. Dkt. No. 5728 (1954); *Kraft-Phenix Cheese Corp.*, 25 F. T. C. 537, 546 (1937).

58 See *Reid* v. *Harper & Bros.*, 235 F. 2d 420 (2d Cir. 1956), cert. denied, 352 U. S. 952 (1956); *Russellville Canning Co.* v. *American Can Co.*, 87 F. Supp. 484, 496 (W. D. Ark. 1949), rev'd on other grounds, 191 F. 2d 38 (8th Cir. 1951).

cation for each step of their cost savings study. For where they fail to provide sufficient data in support of their decisions, the suspicion is inevitably aroused in government and judicial circles that they are assuming—rather than proving—arbitrary conclusions sought by their client.[59]

If such good faith can be documented by proof rather than declared by words, the government investigator will tend to be tolerant, the government litigator will be inclined to be apprehensive and the Commission and court will undoubtedly be sympathetic. Where legal uncertainties as to the meaning of the Robinson-Patman Act are further confounded by accounting perplexities of its cost proviso, confused observers are only too happy to be led by the kindly light of good will.

Advance Planning

A third, but less obvious, suggestion is that the attorney and the accountant should undertake their joint cost savings venture, if possible, before litigation appears upon the legal horizon. The principal reason why the defense of cost justification in past Robinson-Patman proceedings has usually failed[60] is—in the humble opinion of the writer—that the cost studies were in most instances prepared during, rather than before the commencement of, governmental inquiry.

The cost justification study which is prepared prior to the grant of a justified price differential—and thus before any hostile scrutiny—is part of the *res gestae* and thus is unmistakable evidence of good faith. No charge can reasonably be made that such advance cost planning, as contrasted with a study made during litigation, is a mere lawyer's afterthought hastily improvised by facile accountants to give a color of legality to an arbitrary discrimination.

Such an advance cost study, however, preferably should conform to two standards. First, a record should be made that the attorney

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59 *Standard Oil Co. of Ind.*, 41 F. T. C. 263 (1945) and 43 F. T. C. 56 (1946), modified, 173 F. 2d 210 (7th Cir. 1949), and rev'd on other grounds, 340 U. S. 231 (1951); *C. E. Niehoff & Co.*, F. T. C. Dkt. No. 5768 (1955), modified, 241 F. 2d 37 (7th Cir. 1957), cert. granted, 353 U. S. 982 (1957); *Standard Brands, Inc.*, 29 F. T. C. 121, 151 (1939), 30 F. T. C. 1117 (1940), 46 F. T. C. 1485 (1950), aff'd, 189 F. 2d 510 (2d Cir. 1951).

60 REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, at 171 (1955).

and the accountant have proceeded first to determine the maximum allowable cost savings, and only then have recommended a price differential to the extent of the proven cost savings. It would be less convincing for them to assume at the outset what price differential is to be justified and thereafter to seek evidence to substantiate it. Verdict first and impartial trial later may satisfy the judicial standards of *Alice's Wonderland*, but such a procedure does not always appeal to those trained in Anglo-Saxon legal traditions. Second, a record should further be made that—following the advance cost justification study—either accounting controls or periodic spot checks have been instituted to ensure that the price differential continues to make only due allowance for cost savings. A price differential conceived in the lawful wedlock of attorney and accountant may subsequently stray from the straight and narrow path of cost justification unless watched by its parents.

Reasonable Disclosure

The final suggestion is that when a creditable cost savings study has been made, it should not be hidden under a basket when litigation is threatened. Few public or private litigators wish to tie themselves up in losing cases. As soon as a government investigator appears on the scene in a normal case, accordingly, he should be presented with the cost study and persuaded, if possible, to divert his energies more profitably elsewhere. Similar treatment may at times also be accorded to a potential private litigator if he is not a competitor and his counsel provides convincing assurance that the cost data will be kept confidential.

Even where no cost study has been made, but there exists evidence that such a study—if undertaken—would justify a challenged discrimination, it is well to maintain close liaison with the Commission investigator and its accountants while preparing that study. At times such a belated showing of virtue has also succeeded[61] in deflecting the time and energies of the Commission's staff to more promising fields of antitrust error even after a complaint has been filed. Certainly nothing is lost, and much may be gained, by such a belated cooperative undertaking. The time to despair of any possible showing

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[61] *Hamburg Bros., Inc.*, F. T. C. Dkt. No. 6721 (1957); *Horlicks Corp.*, 47 F. T. C. 169 (1950).

of cost justification is only when the rigor mortis of an adverse final order or judgment has set in.

It might be added that the Federal Trade Commission commendably recognizes that any such cost study submitted to its staff must be kept confidential. Accordingly it is not possible to know how many investigations have been dropped due to such timely disclosures that questionable price discriminations were in fact cost justified. It is reliably reported by Commission sources, however, that many such investigations have been and presumably will continue to be--happily--terminated for this reason.

Conclusion

At the outset of this paper, reference was made to the accountant who comes upon a price discrimination. Thereafter, in the succeeding pages, the legal issues and the possible role of the accountant with respect to these issues have been described. The accountant may now ask what he may do to ensure that he will enjoy such a role in dealing with these issues.

It is respectfully suggested that the accountant best ensures that he will enjoy an accounting role with respect to a price discrimination by calling it to the attention of his client. For not only does he thereby serve well his client when he suggests study of that discrimination and its potential problems by his client, but he may also serve well himself. His client's attorney upon review of the discrimination will in many cases be forced--through lack of accounting skill--to reciprocate by calling in the accountant to assist him in analyzing the cost justification issues thereby raised. By throwing bread upon the client's waters, therefore, the accountant may eventually be rewarded many fold.

Which suggests, as a paraphrase of a famous safety slogan, that an accountant who comes to a price discrimination would be well advised to "stop," "look" and have his client's attorney "listen," for the fee that he saves may be his own.

ANTITRUST NEWSLETTER

Supreme Court (as of June 16, 1958)

Dkt. 51—*United States* v. *Procter & Gamble Co.* (U. S. District Court of New Jersey), Appeal filed December 3, 1956. Decision rendered June 2, 1958.

The United States District Court for New Jersey dismissed a government antitrust action when the government failed to produce. for inspection and copying, the transcripts of testimony of witnesses who had appeared before a grand jury investigating possible violations of the antitrust laws. The government had filed a motion in the District Court requesting that if production were not made the Court would dismiss the complaint.

The Supreme Court reversed the dismissal of the District Court basically on the ground that defendant had failed to show good cause as required by Rule 34 for the production of the grand jury transcript. The Supreme Court noted that while appellant had demonstrated that the transcript would be useful in preparation, this reason was far outweighed by the policy for maintaining secrecy of the grand jury proceedings. In addition, the Supreme Court stated that the government had not consented to the dismissal of the action by its motion but, rather, had merely sought an expeditious procedure for appeal.

The Supreme Court noted that witnesses were encouraged to testify before the grand jury freely without fear of retaliation and that the grand jury might suffer if those testifying today know that the secrecy of their testimony would be lifted tomorrow. The Court pointed out that there are instances when the indispensable secrecy of grand jury proceedings, because of the compelling necessity, should be lifted. But the compelling necessity must be shown with particularity.

The Court pointed out that the appellant sought a wholesale discovery of all the minutes of the grand jury proceedings and

had made no attempt to particularize any special needs. The Supreme Court suggested that had the government attempted to use the grand jury proceeding solely to obtain evidence for a civil case, wholesale discovery would be warranted. Thus, if it could be shown that the government had used the grand jury proceeding to gather evidence for a civil case without intending to seek an indictment, the criminal procedure would be subverted.

Dkt. 348--*Societe Internationale Pour Participations Industrielles et Commerciales, S.A.* v. *Brownell* (D. C. Cir.), Petition filed August 6, 1957. Certiorari decided June 16, 1958.

Speaking for a unanimous* Court, Justice Harlan briefly reviewed the pertinent facts of the case. In 1948, petitioner, hereinafter referred to as Interhandel, moved as a national of a neutral (Swiss) power to recover Aniline assets seized during World War II by the Alien Property Custodian pursuant to the Trading with the Enemy Act. The government resisted claiming that Interhandel did not own Aniline but that even if it did it was an "enemy." The District Court held the documents to be within its "control" and so ordered Interhandel to produce the records of one Sturzenegger pursuant to Rule 34. Interhandel moved to be relieved on the ground the compliance might entail the imposition of criminal sanctions by the Swiss, while the government moved for dismissal under Rule 37(b)(2). Prior to ruling on these motions, a Special Master was appointed who held that the application of preventive police power by the Swiss was in accordance with its established doctrines; that the seizure of the documents was not collusive and that petitioner had sustained the burden of establishing its good faith efforts at compliance. In the meantime, the Swiss Government "confiscated" the documents in question but left them in Sturzenegger's possession. Acting pursuant to Rule 37(b)(2), the District Court dismissed the suit holding that, "apart from Swiss law," Interhandel had "control" of the documents and that Swiss law did not furnish an adequate excuse for noncompliance. 111 F. Supp. 435. The Circuit Court affirmed the dismissal order on the theory that such was permissible either under Rule 41(b) or its "inherent power" but, like the District Court before it, authorized an additional period of grace (225 F. 2d

* Mr. Justice Clark took no part in the consideration of this case.

532). Since petitioner's continued efforts (which resulted in the production of 190,000 documents and a compromise offer for inspection of the books) failed to satisfy the Court, final dismissal was adjudged (243 F. 2d 254).

Discounting the Swiss confiscatory action entirely, the Supreme Court flatly rejected the contention that the interdictions of the Swiss law precluded a finding that Interhandel had "control" of these documents for Rule 34 purposes. Clearly by so doing, the Supreme Court affirmed the lower court's actions of ordering production. Equally as clear is the fact that the nature of this action (recovery of seized assets) was of controlling importance to this ruling, e.g.:

> "United States courts should be free to require claimants of seized assets . . . to make all such efforts to the maximum of their ability . . . to . . . dispel any doubt . . . as to true ownership of the assets.
>
> "*We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control.* Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation. The propriety of the use to which it is put depends upon the circumstances of a given case . . ." (at 4398, underscoring supplied).

While the Supreme Court said that the posture of the facts in this case did not preclude a finding of "control"—by its very terms, a prerequisite to the issuance of a Rule 34 order—it did not expressly rule on the question apart from approving the order itself.

Justice Harlan next considered the appropriate source of a court's authority to dismiss for failure to comply with a Rule 34 production order and concluded that to be Rule 37(b)(2)(iii).

Turning finally to the question of whether the District Court's dismissal order was proper in view of the Special Master's findings which were adopted by the District Court and approved by the Circuit Court that petitioner had not engaged in collusively obstructionist activities and had in good faith made diligent efforts to comply with the order, the Court held that Rule 37 should not be construed to authorize dismissal for noncompliance where, as here, such failure

has been due to inability and not to wilfulness, bad faith or any fault of the petitioner. The cases, said the Court, establish that there are constitutional limitations upon a Court's power to dismiss an action without affording a party a hearing on the merits. Noting that the role of the petitioner herein was more analogous to that of a defendant than a plaintiff, the Court went on to emphasize that the Trading with the Enemy Act authorized summary seizure of Aniline's assets and afforded no opportunity at that time for protest. Only the provisions of that act which provide for a later judicial hearing on the propriety of such seizure rescued it from a constitutional attack on Due Process and Just Compensation grounds. Fear of criminal prosecution, whether under United States or foreign laws, said the Court, "constitutes a weighty excuse for nonproduction." The Court noted that petitioner did not object on the grounds that disclosure would reveal facts which might form the basis of a criminal action, rather, that more disclosure entailed penal strictures. Nor did petitioner seek to enforce Swiss banking laws in a United States court; it only asserted them as an excuse for its inability to comply with the order. Viewed in this light and under the narrow circumstances presented by this case, the Court refused to construe Rule 37 as authorizing the dismissal. The Court concluded by noting that its ruling in no way reduced the burden which was plaintiff's in establishing its status as a nonenemy. Accordingly, the case was remanded to the District Court for disposition "in whatever manner it [in the exercise of its wide discretion] deems most effective."

Dkt. 435--*Federal Trade Commission* v. *National Casualty Company* (Sixth Circuit), September 6, 1957, Petition Filed. November 12, 1957, Certiorari granted and case consolidated with Docket 436. April 9 and 10, 1958 oral argument was presented by counsel.

The question presented is whether the FTC, in view of the McCarran-Ferguson Act, had jurisdiction to regulate the advertising practices of an insurance company in those states where insurance advertising was the subject of regulation by state law.

Dkt. 645--*Eagle Lion Studios, Inc., et al.* v. *Loew's Inc., RKO Theatres, Inc., et al.* (S. D. N. Y.), December 5, 1957, Petition Filed. January 20, 1958, Petition Granted.

The Second Circuit affirmed the District Court's ruling that two motion picture theatre circuits and a booking company did not conspire in violation of the Sherman Act to exclude other companies from the opportunity of licensing feature motion pictures on a competitive basis. It is the contention of the petitioner that the lower court had misconstrued Section 5 of the Clayton Act by failing to make available to petitioners all matters previously established by the government in antitrust actions.

Dkt. 650—*International Boxing Club of New York, Inc.* v. *United States* (S. D. N. Y.), Appeal filed December 9, 1957. March 17, 1958, probable jurisdiction was noted.

The U. S. District Court for the Southern District of New York had held that two individuals, two boxing clubs and a stadium corporation had conspired to restrain and to monopolize the promotion of professional championship boxing contests and had monopolized the promotion of such boxing contests. Very broad injunctive relief was granted by the Court.

The question presented to the Supreme Court relates only to the nature of the relief granted. The case is particularly important in that it should give a guide to the type of relief which the Supreme Court will deem applicable to a monopoly case of this nature.

Dkt. 692—*Guerlain, Inc.* v. *United States* (S. D. N. Y.), December 30, 1957, Appeal filed. February 3, 1958, probable jurisdiction was noted. March 3, 1958, case transferred to Summary Calendar.

U. S. District Court for the Southern District of New York held that an American company, having a French affiliate which granted to the American company the exclusive right to distribute trademark goods in the United States, had attempted to monopolize and did monopolize the importation into and the sale within the United States of such trademark goods by utilizing Sec. 526 of the Tariff Act of 1930.

There are two basic questions to be considered by the Supreme Court in this appeal. The first question relates to the definition of the relevant market upon which to measure the alleged monopolization. The second question relates to the interrelationship between Sec. 526 of the Tariff Act of 1930 and Secs. 1 and 2 of the Sherman Act.

Companion cases to Dkt. 692 are Dkt. 751, *Parfume Corday, Inc.* v. *United States*, and Dkt. 752, *Lanvin Parfums, Inc.* v. *United States*.

On March 3, 1958, Dkts. 692, 751 and 752 were all transferred to the Summary Calendar.

Dkt. 761—*National Theatres Corp.* v. *Bertha Building Corp.* (2d Cir.), February 3, 1958, Petition filed. Certiorari denied April 28, 1958.

This case presented questions of law relating to the interrelation of liability to a corporate defendant and its subsidiaries. It was contended that a corporate defendant cannot escape liability by piercing its own corporate veil when at all prior times separate corporate entities have been maintained for its subsidiaries. Also presented were questions of credibility relating to the repudiation of prior pleadings and sworn testimony in subsequent judicial proceedings.

Dkt. 840—*Cumbiner Theatrical Enterprises, Inc.* v. *National Theatres Corporation* (2d Cir.), March 6, 1958, Petition filed.

This case, a companion case to Dkt. 761, was denied Certiorari April 28, 1958.

Dkt. 904—*E. V. Prentice Machinery Co.* v. *Associated Plywood Mills, Inc.* (9th Cir.), April 7, 1958, Petition filed. Certiorari denied May 5, 1958.

The petitioner, in the District Court, had alleged that defendant had violated certain of the antitrust laws and that said violation had caused substantial injury to the plaintiff. Defendant admitted violations of the Clayton Act but contended that the decline in plaintiff's business was the result of causes other than defendant's violation of the antitrust laws. The Court had ruled that the plaintiff had failed to show the necessary element of damages.

Dkt. 905—*Beacon Theatres, Inc.* v. *Hon. Harry A. Westover* (9th Cir.), April 8, 1958, Petition filed. May 19, 1958, Certiorari granted.

The Ninth Circuit denied defendant's petition for writ of mandamus to compel the trial court to vacate orders granting the plaintiff's motion to strike defendant's demand for a jury trial on a complaint and answer and directing the issues to be tried to the court

without a jury separate from defendant's counterclaim for damages under the antitrust laws.

Other Federal Courts

Darden v. *Besser* (C. A. 6th Cir., July 1, 1958).

An award of $10,000 to the plaintiff's attorneys in a treble damage action in which a $45,000 treble damage judgment was entered is held inadequate. A minimum fee of $30,000 should have been awarded in view of the time and skill employed, the experience brought to bear, and the result achieved.

Vincent W. Kosuga v. *Jack H. Kelly* (C. A. 7th Cir., June 23, 1958).

Reciprocal promises to refrain from dealing in onions on the futures market do not bar an action to recover the price of onions sold. The restrictive provisions, even if illegal under the Sherman Act, were separable from the legal promise to pay for the onions. Inasmuch as the transaction involved interstate commerce, the Antitrust Act of Illinois was not applicable.

State Courts

General Electric Company v. *American Buyers Cooperative, Inc.* (C. A. Ky., June 13, 1958).

The Kentucky Court of Appeals rules that the nonsigned provision of the Kentucky Fair Trade Act is unconstitutional under the state's Constitution. However, the Court expressly holds that the provisions of the Act authorizing fair trade contracts are constitutional. In holding the nonsigner provision invalid, the Court finds, among other things, that the provision "is a legislative invasion of the broad constitutional liberty of the people to acquire and protect their property and engage in free trade."

Central Arkansas Milk Producers Assn. v. *Consumer's Warehouse Market, Inc., et al.* (Ark. Chanc. Ct., Sebastian County, April 15, 1958).

An Arkansas law prohibiting the sale of milk below cost has been held unconstitutional and void for violation of the Arkansas Constitution and the United States Constitution.

Gillette Company v. *Milshap Drug Sales Corporation* (N. Y. Sup. Ct., N. Y. County, June 18, 1958).

A manufacturer of toiletry articles is granted a permanent injunction prohibiting a non-contracting retailer from selling the manufacturer's articles below fair trade prices. The retailer contended that the manufacturer unfairly discriminated in its prices to retailers; however, the evidence merely indicated that the manufacturer allowed discounts for quantity sold or time of payment.

In the Matter of Special 1952 Grand Jury (D. C. E. D. Pa., May 22, 1958).

A defendant in a private antitrust action is permitted to inspect the testimony given by one of the plaintiffs during a grand jury investigation. The plaintiff had been named by the government as a co-conspirator of those indicted by the grand jury and later brought the private action against the defendant, which was investigated but not indicted or named as a co-conspirator by the grand jury. As a matter of justice, the defendant had a right to the discovery of testimony necessary to enable it to prepare its defense. Only the government objected to the disclosure of the testimony.

Department of Justice Activity

United States v. *National Alfalfa Dehydrating & Milling Co. of Saunders Mills, Inc., et al.* (D. C. Col., Complaint, June 27, 1958).

Attorney General William P. Rogers announced the filing of a complaint in the United States District Court for the District of Colorado charging that the recent acquisition by National Alfalfa Dehydrating and Milling Company of Saunders Mills, Inc. and Midland Industries may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act. National Alfalfa's acquisition of Saunders Mills and Midland Industries eliminated two of National Afalfa's major competitors in the production and sale of dehydrated alfalfa. Dehydrated alfalfa is an important constituent of mixed feeds widely used by farmers and feeders and growers of livestock and poultry. The dehydrated alfalfa industry, though relatively new, does a business of approximately $50,000,000 annually. Dehydrated alfalfa is widely recognized by farmers and feeders and growers of livestock and poultry as a source of protein and vitamin A, plus other growth factors needed by animals and

poultry. Dehydrated alfalfa is widely used in most varieties of mixed feeds, and the perfection of inert gas storage as a method of retaining dehydrated alfalfa's nutritive content at a constant level, preventing rapid deterioration, allows manufacturers of mixed feeds to produce high quality mixed animal and poultry feeds throughout the year. National is alleged to be the largest producer of dehydrated alfalfa, and acquired companies, Saunders Mills and Midland Industries, were respectively the third and fifth largest firms in the industry. Saunders Mills operated fifteen dehydrating plants located in the States of Colorado, Idaho, Missouri, Nebraska, Ohio and Tennessee. Midland Industries operated dehydrating plants located in the States of Kansas, Oklahoma and Nebraska. The relief sought from National Alfalfa is divestiture of all the stock and assets it acquired from Saunders Mills and Midland Industries. The complaint also asks that National Alfalfa be required to license its patents relating to inert gas storage to all competitors at a reasonable royalty. An injunction against further acquisitions in the industry is also sought.

United States v. *Frozen Food Distributors Assn. of N. Y., et al.* (D. C. S. D. N. Y., Indict., June 30, 1958).

Attorney General William P. Rogers announced that a federal grand jury in New York City returned an antitrust indictment charging an association, six corporations and five individuals with conspiring to restrain trade in frozen food specialties. A companion civil suit was also filed against the same defendants to enjoin the continuation of the alleged unlawful practices. The grand jury charged in the indictment that the defendants have engaged in a combination and conspiracy to maintain and stabilize prices of frozen food specialties; to coerce and persuade distributors to increase prices to arbitrarily high levels; and to boycott packers who sell to non-conforming distributors.

United States v. *Arnold, Schwinn & Co., et al.* (D. C. E. D. Mo., Complaint, June 30, 1958).

Attorney General William P. Rogers announced the filing of a civil antitrust complaint in the United States District Court for the Eastern District of Missouri, at St. Louis, charging Sherman Antitrust Act violations in the distribution of Schwinn bicycles and parts and accessories. The complaint charges that, beginning about 1952, the defendants and co-conspirators have engaged in an unlawful

combination and conspiracy, and have made unlawful contracts and agreements, in restraint of trade in Schwinn products. Sales of such products are said to amount to nearly $17,000,000 per year, of which about 80% are made through wholesale distributors and about 15% through Goodrich. It was alleged that, pursuant to the combination and conspiracy: (1) Schwinn franchised in each market area a limited number of retailers, and the wholesaler co-conspirators agreed to confine their sales of Schwinn products to such franchised retailers; (2) Goodrich confines its sales of Schwinn products to Goodrich outlets only; (3) retailers in Missouri and in other States adhere to retail prices fixed by Schwinn; (4) franchised retailers and Goodrich outlets who fail to observe the fixed prices are reported, and they are not thereafter supplied by Schwinn, Goodrich or wholesaler co-conspirators; and (5) each cycle wholesaler co-conspirator has been allocated a certain marketing territory and confines its Schwinn products sales to that territory. The complaint asks the court to enjoin the defendants from continuing the alleged offenses, to declare Schwinn's franchise and price maintenance agreements void, and to prevent further allocations of marketing territories and of customers.

United States v. *Baton Rouge Insurance Exchange* (D. C. S. D. La., Complaint, June 27, 1958).

Attorney General William P. Rogers announced the filing in the Federal District Court in New Orleans of an antitrust civil action charging the Baton Rouge Insurance Exchange with violating the Sherman Antitrust Act by conspiring with its members to restrain trade in and to monopolize the business of selling and writing fire, casualty and other insurance in East Baton Rouge Parish, Louisiana. At the same time, a consent judgment was entered terminating the case. The government's complaint which was similar to that filed by the government against the New Orleans Insurance Exchange on January 15, 1954, charged the defendant Exchange and its members who were named as co-conspirators with agreeing to boycott and not to represent (1) insurance agents who were not members of the Exchange; (2) insurance companies which appointed agents who were not members of the Exchange; (3) non-stock companies and (4) insurance companies which deal directly with insurance brokers in East Baton Rouge Parish. The complaint further charged

the Exchange and its members with agreeing to (1) conduct their respective businesses only by such methods as might be established or approved by the Exchange; (2) fine or expel members for dealing with non-members and (3) act in concert in soliciting business from public agencies and to divide the receipts of such business on a prorated share basis established by the Exchange. The judgment entered today prohibits the defendants from engaging in the practices charged in the complaint. In addition, the Exchange is enjoined from (1) inspecting the books or otherwise policing the business activities of any of its members or any other person; (2) exacting fines or other punitive damages from any of its members or any other person; (3) receiving any commissions for the sale of insurance and (4) preventing any member of the Exchange from engaging in any business. The Exchange must also require that as a condition of membership, each member comply with the terms of the Final Judgment. Eighteen months from the date of entry of the judgment the government must file with the Court a report of the progress on the compliance of the Exchange and its membership with the decree.

United States v. *The White Motor Co.* (D. C. E. D. Ohio, Complaint, June 30, 1958).

Attorney General William P. Rogers announced the filing in the United States District Court at Cleveland, Ohio, of a civil antitrust suit charging The White Motor Company, Cleveland, Ohio, with violation of Sections 1 and 3 of the Sherman Act and Section 3 of the Clayton Act. The White Motor Company is one of the leading manufacturers of heavy-duty trucks in the United States. It manufactures White trucks and parts in Ohio and Pennsylvania and sells them to franchised distributors, franchised direct dealers, and directly to customers known as "national accounts" and to federal and state governments. The total wholesale value of White trucks and parts sold in 1957 exceeded $200,000,000. The complaint charges that The White Motor Company and its distributors and dealers have agreed upon exclusive wholesale and retail sales territories, that White's distributors and dealers will not sell White trucks and parts to others for resale, that the distributors and dealers will not sell White trucks to the federal or any state government, such customers being reserved by White for direct sales, that the distrib-

utors will sell White trucks and parts to dealers at fixed prices, and that White and its distributors and dealers will sell White parts to "national accounts," "fleet accounts," and federal and state governments at fixed prices. The complaint also charges that White has sold and contracted for the sale of White truck parts on the condition that its distributors and dealers will not sell or use competitive truck parts. The complaint names as co-conspirators, but not as defendants, White's distributors and dealers. The complaint charges that these agreements have unreasonably restrained competition among White's distributors and have substantially lessened competition in the sale of competitive truck parts. The complaint seeks injunctive relief to eliminate the described restrictive practices and to re-establish competitive conditions.

United States v. *True Temper Corporation, et al.* (D. C. D. N. Ill., Complaint, June 30, 1958).

Attorney General William P. Rogers announced the filing in Chicago, Illinois, of a two-count antitrust indictment and companion civil antitrust complaint relating to the domestic production and distribution of golf clubs and steel shafts for golf clubs. At the same time he announced the filing of a civil antitrust complaint relating to the production and distribution of steel shafts in the United States and in foreign countries. All three proceedings are in the United States District Court for the Northern District of Illinois. The following corporations are named as defendants in the indictment and companion civil complaint, which concern the domestic trade: True Temper Corporation, Cleveland, Ohio; Wilson Athletic Goods Mfg. Co., Inc., River Grove, Illinois; A. G. Spalding & Bros., Inc., Chicopee, Massachusetts; MacGregor Sport Products, Inc., Cincinnati, Ohio; and Hillerich & Bradsby Co., Louisville, Kentucky. According to that indictment and companion civil complaint, True Temper Corporation is the leading manufacturer of steel shafts for golf clubs, producing approximately 90% of all such steel shafts made in this country and selling them for more than $5,000,000 per year. The other corporate defendants are the "big four" manufacturers of golf clubs, selling about 80% of all golf clubs in this country for nearly $25,000,000 per year. It was charged in the indictment and companion civil complaint that True Temper Corporation and the "big four" golf club manufacturers have violated

the Sherman Antitrust Act by engaging in a combination and conspiracy to restrain and to monopolize interstate trade in steel golf shafts and golf clubs. Pursuant to that alleged combination and conspiracy: (1) the "big four" manufacturers fix so-called lowdown prices for golf clubs; (2) True Temper Corporation communicates those prices to other golf club manufacturers who purchase True Temper steel shafts, and it refuses to supply its steel shafts to golf club manufacturers who fail to adhere to those fixed prices; (3) the "big four" manufacturers refuse to purchase steel shafts from competitors of True Temper Corporation and purchase all of their steel shaft requirements from True Temper Corporation; (4) True Temper Corporation grants to the "big four" manufacturers preferential prices, discounts, and allowances on steel shafts; and (5) True Temper Corporation's top grade steel shafts must be used in those types of golf clubs only which are sold to "pro shops" and not to ordinary retail outlets. In the third proceedings, the civil complaint relating to commerce in steel shafts in the United States and abroad, only True Temper Corporation is named as defendant. It was charged that True Temper Corporation and the foreign co-conspirators have been parties to unlawful agreements and have engaged in an unlawful combination and conspiracy to restrain and to monopolize interstate and foreign trade in steel shafts, in violation of the Sherman Antitrust Act. By the terms of the alleged combination and agreements, it was alleged, exclusive world markets for steel shafts have been allocated and exports and imports of steel shafts from and to the United States have been illegally prevented. This complaint seeks, among other injunctive relief, a court order compelling True Temper Corporation to sell its stock interests in certain British and Australian companies.

U. S. v. *Rudolph Wurlitzer Company* (D. C. W. D. N. Y., Consent Judgment, April 15, 1958).

Attorney General William P. Rogers announced the entry of a consent judgment in the Federal District Court at Buffalo, New York terminating civil antitrust proceedings against the Rudolph Wurlitzer Company of North Tonawanda, New York, a major manufacturer and distributor of coin operated phonographs. The government's complaint which was filed February 28, 1957 charged the defendant with violating Section 1 of the Sherman Act by having engaged in

an unlawful combination and conspiracy, with its distributors, to allocate territories and customers for the sale and distribution of coin operated phonographs. The complaint alleged that each of the distributors had agreed with the defendant to refuse to sell new or used Wurlitzer products to "operators" by any other person outside a restricted sales territory allocated to the distributor. "Operators" are persons who own coin operated machines and lease them to persons owning or operating restaurants, taverns or other places of business where coin operated phonographs are placed for use by the public. The Final Judgment entered prohibits the defendant Wurlitzer from restricting or limiting the persons to whom its machines can be sold; prohibits any restriction or limitation by Wurlitzer on the territories within which any of its distributors or operators may sell coin operated machines manufactured by Wurlitzer and prohibits Wurlitzer from cancelling any distributorship because of the refusal of the distributor to limit or restrict his sales or the territories within which he chooses to sell Wurlitzer products. The Final Judgment also prohibits Wurlitzer from maintaining any list of its distributors' customers or the serial number of phonographs sold by them for the purpose of restricting or limiting the freedom of choice of the distributors in selling Wurlitzer products.

U. S. v. *New York Pickle and Condiment Dealers Assn., Inc.* (D. C. S. D. N. Y., Indictment, April 18, 1958).

Attorney General William P. Rogers announced that a federal Grand Jury in New York City indicted the New York Pickle and Condiment Dealers Association, Inc., an association of wholesalers of pickles and sauerkraut, and The Greater New York Food Processors Association, Inc., an association of packers of pickles and sauerkraut. Both associations were charged with suppressing competition in the sale and distribution of pickles and sauerkraut to restaurants and retailers in the New York metropolitan area in violation of Section 1 of the Sherman Act. Companion civil suits were also filed against both associations in the United States District Court in New York City charging substantially the same violations as are charged in the indictments. The suits seek injunctive relief designed to restore competitive conditions. According to one indictment The Greater New York Food Processors Association, Inc., whose members have an annual sales volume greater than ten million dollars, agreed

on pickle and sauerkraut prices and caused pickets to be placed at the plants of those who sold below the agreed prices. The association is also alleged to have hindered, delayed or stopped shipments of raw pickles, cabbage and sauerkraut to and from plants of non-cooperating pickle packers. The other indictment charges that pickle-men were induced or compelled to join the New York Pickle and Condiment Dealers Association, Inc. and that they then agreed to refrain from competing for each other's customers. It is alleged that the association fined those members who would not cooperate or arranged to have them picketed. According to the indictment the association also persuaded or compelled suppliers to refuse to deal with picklemen who failed to join the association or failed to refrain from competing for other picklemen's customers.

U. S. v. *Hughes Tool Company* (D. C. S. D. N. Y., Consent Judgment, August 2, 1958).

Attorney General William P. Rogers announced the entry in the Federal District Court in New York City, of a consent judgment successfully terminating a civil antitrust suit, filed on August 2, 1957, charging Hughes Tool Company, Houston, Texas, with violating Section 1 of the Sherman Act in connection with the manufacture, distribution and sale of oil and gas well drilling equipment. Hughes Tool Co. has a leading position in this industrial field and, in particular, is alleged to be the world's leading manufacturer of rock bits and of flash-welded tool joints. A German company, Maschinen-und Bohrgeratefabrik Alfred Wirth & Co., Kommanditgesellschaft, of Erkelenz, Germany, was named as a co-conspirator. The government's complaint charged that Hughes Tool engaged in restrictive practices concerning oil and gas well drilling equipment by entering into contracts with Wirth, a leading European manufacturer of drilling equipment, and with two other prominent German companies manufacturing drill pipes. It was charged that these contracts, among other things, provided that Wirth should not produce or sell certain items of drilling equipment except by defendant's permission; that the defendant and Wirth agree upon minimum prices to be charged by the latter; that oil and gas well drilling equipment produced or assembled by Wirth should not be sold for use in the Western Hemisphere; that defendant and Wirth should pool their present and future patents on tool joints and rock bits; and that

the two other German companies should be limited to producing those kinds of drill pipes which can be used only in connection with certain other complementary items of drilling equipment. The judgment entered enjoins agreements relating to drilling equipment, with foreign companies, restricting the manufacture, sale, distribution, import or export or allocating or dividing territories, fixing prices, selling through joint agents, disclosing customer lists and returning know-how to defendant. Defendant is further enjoined from utilizing its trade-marks, patents or know-how in order to prevent the importation into the United States of drilling equipment lawfully bearing the name or a trade-mark of defendant or manufactured under a license from defendant.

U. S. v. *Lever Brothers Co., et al.* (D. C. S. D. N. Y., Complaint, July 8, 1958).

The Department of Justice announced the filing of a civil antitrust suit against Lever Brothers Co. and the Monsanto Chemical Co. in the Federal Court at New York, New York. The complaint is based on the acquisition by Lever Brothers, the second largest domestic seller of general service packaged and liquid synthetic detergents, of trade-marks, patents, copyrights and other properties relating to "all" from Monsanto. In return Lever Brothers obligated itself to purchase Monsanto products. The complaint charges that the "all" acquisition violates Section 7 of the Clayton Act. According to the complaint the transfer of "all" eliminated competition between Monsanto and Lever Brothers and may tend to substantially lessen competition in the detergent field. Prior to the transfer of "all" to Lever Brothers, Monsanto's sales amounted to over 5% of the market for detergents. It is alleged that the transfer gives Lever Brothers about 20% of the market. The transfer of "all" from Monsanto to Lever will eliminate actual and potential competition between the two companies in the sale of detergents according to the complaint. The complaint requests that the court declare the transfer in violation of the Clayton Act and that Lever Brothers be required to divest itself of "all."

Federal Trade Commission Activity

F. T. C. v. *Shell Oil Co.* (FTC Dkt. #6698, Consent Order, April 18, 1958).

The Federal Trade Commission approved a consent order prohibiting Shell Oil Co., New York City, from unlawfully discriminating in price by granting user discounts to customers who resell the gasoline, and prohibiting two of its customers, Premier Cab Assn., Inc., and Washington Cab Assn., Inc., both of Washington, D. C., from receiving user discounts on gasoline bought for resale. The Commission adopted with modification an initial decision by Hearing Examiner Everett F. Haycraft containing an order agreed to by the three companies and the Commission's Bureau of Litigation. It granted the joint motion of this Bureau and Shell to modify a portion of the order relating to Shell. A Commission complaint, issued December 26, 1956, charged Shell with selling gasoline to these two customers for resale to the public at 2½¢ per gallon less than it charged competing retail filling stations, in violation of Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act. The Associations were charged with knowingly inducing the favored prices, in violation of Sec. 2(f) of the law. Although the Cab Associations received these lower prices as users of gasoline under a special contract providing that the gasoline was not intended for resale, Shell knew that it was being resold to the public, the complaint alleged. Under the order, Shell must charge user purchasers, for gasoline they resell to the public in competition with retail filling stations, the same price it charges the filling stations. Among other transactions, the order does not apply to (1) sales to companies for their own use or the use of their affiliates, or (2) sales to a cooperatively owned taxicab company for use in members' cabs. The two Associations are required to discontinue knowingly inducing or receiving favored prices for products they resell for use in vehicles other than members' cabs.

F. T. C. v. *Thompson Products, Inc.* (FTC Dkt. #5872, Initial Decision, April 18, 1958).

A Federal Trade Commission hearing examiner issued an order which would prohibit Thompson Products, Inc., Cleveland, Ohio, from granting preferential prices on automotive replacement parts to automobile makers and other original equipment manufacturers to the competitive disadvantage of its own distributors. Examiner Earl J. Kolb found that the lower prices charged these favored customers have resulted in Thompson's distributors being unable to

compete profitably. These legally unjustified price discriminations, he ruled, violate Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act. In 1955, the examiner said, Thompson sold valves and front-end parts, for both original equipment and replacement use, to General Motors, Chrysler, Ford, and other manufacturers for less than it charged its franchised distributors. This favored treatment enables the manufacturers to resell replacement parts to their franchised new car dealers at prices which Thompson's distributors cannot meet. It also enables them to pay allowances to the dealers on parts these dealers sell at wholesale to others in competition with the distributors. "This price advantage," the examiner continued, ". . . not only in large part contributed to the foreclosure by the vehicle manufacturer of the franchised new-car dealer as a replacement parts customer of the Thompson distributor and jobber, but further set up the franchised new-car dealer as a powerful wholesaler competitor on these parts in the place of a former actual or potential customer. Originally, parts could be obtained at a cheaper price from the jobber, but subsequent to the use of the wholesale plan, the car dealer now sells at the same or lower price." Thompson distributors in four sample trade areas (Washington, D. C., Baltimore, Md., and Norfolk and Richmond, Va.) testified they could not profitably sell to dealers at the new-car dealer price suggested by Thompson, the examiner said. Their testimony also shows they could not meet the wholesale competition of dealers except at a loss of profit. Such sales were made only to keep the customer because more profitable items were included. Emphasizing the competitive effect of the disparity in prices paid by the manufacturers and Thompson's distributors, the examiner pointed to distributors' testimony that the 2% cash discount is essential in operating their businesses. Their profit margin is small, ranging from 1 to 4 percent, the examiner noted. The examiner rejected the company's defense that its price differentials were justified by lower costs. According to several cost tabulations, prepared by the FTC's Bureau of Investigation, he said, fifteen of the manufacturers received greater price advantages than the 38.15% justified by Thompson's operational costs (warehousing, transportation, advertising, etc.) on its distributors' purchases. For example, Chrysler was charged 45.06% less than Thompson distributors; Ford, 42.77% less; and General

Motors, 41.22% less. The examiner disallowed two cost allocations proposed by Thompson, namely: (1) a claimed allowance of the right to "average" the costs of serving all the manufacturer customers, and (2) a claimed allowance of a so-called "return on investment" to be included as a cost to distributors. The first one, the examiner ruled, "is not an element of cost analysis acceptable under Section 2(a) of the Clayton Act," and the second "is so far removed from the sphere of actual cost differences that it cannot be accepted as applicable to a cost justification defense." His order would prohibit Thompson from charging original equipment manufacturers less for replacement parts than it charges their competitors, unless it can substantiate the differentials. However, the examiner found that the different prices charged Thompson's franchised distributors and jobbers under its non-retroactive purchase bonus plan have been cost justified. This plan provides for various percentages of distributors' annual purchases to be rebated.

F. T. C. v. *Southern Oxygen Co.* (FTC Dkt. #6372, Consent Order, April 23, 1958).

The Federal Trade Commission approved a consent order prohibiting Southern Oxygen Co., Bladensburg, Md., from discriminating among its customers in the price of oxygen, acetylene and other compressed gases which it produces and sells. The Commission adopted an initial decision by Hearing Examiner William L. Pack containing an order agreed to by the company and the Commission's Bureau of Litigation. An FTC complaint of June 27, 1955, charged that the company's price discriminations diverted substantial business to it from competitors and, where business was not actually diverted, competitors' efforts to meet Southern's discriminatory prices had impaired their profits and lessened their ability to compete. This injury to competition violates Sec. 2(a) of the Clayton Act, as amended, the complaint alleged. These examples of the company's unlawful prices were cited: Some Charlotte, N. C., customers were charged $1.00 or less per hundred cubic feet of oxygen while others were charged up to $2.40. The price range among them for the same amount of acetylene gas was from $3 to $5. During the same period, in Kingsport, Tenn., and many Virginia communities, the price for oxygen ranged from $1.20 to $2.05, and in Lancaster, S. C., it was $1.65. Southern Oxygen effects indirect price discriminations

through charging some, but not all, customers "demurrage" or cylinder rental, the complaint continued. According to the complaint, the company operates producing and processing plants in Maryland, New Jersey, North Carolina, and Tennessee. It has offices and warehouses in these States as well as in Pennsylvania, Virginia, and West Virginia. Additional warehouses are maintained in Delaware, South Carolina, and Kentucky. In Miami, Fla., it operates a distributing agency for medical gases. According to the order, where the company competes with other sellers, it must charge all customers the same price and extend them the same terms for cylinder use. However, price differentials are not prohibited where the lower price is justified by lower manufacturing, selling, or delivery costs. Also, Southern Oxygen may meet, but must not undercut, prices charged by its competitors.

F. T. C. v. *Admiral Corp.* (FTC Dkt. #7094, Complaint, April 17, 1958).

Admiral Corp., Chicago, Ill., one of the nation's major manufacturers of electric appliances, was charged today by the Federal Trade Commission with unlawfully favoring some customers with lower prices and more generous advertising payments over their competitors. A two-count Commission complaint alleges that Admiral: Discriminates in the prices charged its retail customers (radio, television and appliance stores, and furniture, chain and department stores), in violation of Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act; and does not make promotional allowances available to all retailers on proportionally equal terms, in violation of Sec. 2(d) of the law. The first count of the complaint says Admiral charges non-favored retailers higher prices through higher list prices and lower discounts, and by basing favored retailers' discounts on quantity purchases. For example, the complaint charges, during 1956, in Milwaukee, Wis., Admiral classified retailers in four categories and charged each different list prices, resulting in non-favored customers paying from 1% to 10% more than their favored competitors. In addition, the complaint alleges, the less generous discounts given these non-favored customers result in their paying higher net prices ranging from 1% to more than 16%. Noting Admiral has used the same or similar pricing practices in other trading areas, the complaint charges that the effect of these price discrimina-

tions may be substantially to lessen competition. Charging violation of Sec. 2(d) of the Robinson-Patman Act, the complaint alleges that prior to and during 1956 Admiral paid some customers from 50% to 100% of the cost of newspaper advertisements promoting Admiral products. It also paid some customers varying sums for floor and window displays and the like, the complaint says. These allowances, the complaint charges, were offered to some competitors on less favorable terms and were not offered on any terms to others. In some instances, the complaint continues, Admiral's terms precluded non-favored competitors from participating in its promotional programs. According to the complaint, Admiral's gross sales bettered $182 million in 1956. Its products include television and radio receiving sets, phonographs, and various combinations of the three; and ranges, refrigerators, deep freezers, air conditioners and dehumidifiers.

F. T. C. v. *Dresser Industries, Inc., et al.* (FTC Dkt. #7095-6, Complaints, April 17, 1958).

The nation's No. 1 and No. 2 producers of barite were charged by the Federal Trade Commission with increasing their dominant position in the industry through unlawful acquisitions of competitors. Cited in separate Commission complaints are: *Dresser Industries, Inc.*, Dallas, Texas, and its subsidiary, *Magnet Cove Barium Corp.*, Houston, Texas, the industry leader (7095) and *National Lead Co.*, New York City, the second largest producer (7096). One of the acquisitions cited in the complaint against Dresser Industries is that of a Canadian corporation. This is the first time the FTC has challenged a foreign acquisition under the antimerger statute, Sec. 7 of the Clayton Act. The complaints charge that the companies acquired domination and control over former competitors with the intention or effect of eliminating competition or giving themselves a monopoly. These practices, the complaints charge, have restrained trade unreasonably and are unfair methods of competition prohibited by Sec. 5 of the FTC Act. The complaints further charge that the respondents' acquisition of the various corporations may lessen competition or tend to create a monopoly in violation of the antimerger law. According to the complaints, barite is used principally (more than 75% of its total output) as a weighting agent in rotary well-drilling fluids. In this use it has no economical substitutes because

of its high specific gravity, low cost, and other desirable technical factors. To a lesser extent it is used in the manufacture of various barium compounds and in the production of glass, paint, rubber, and other products. These specific acquisitions are cited in the complaint:

MAGNET COVE

Corporate

Canadian Industrial Minerals, Ltd., Toronto, Ontario, Canada, a producer and seller acquired about Nov. 1, 1955.

Superbar Co., Potosi, Mo., a producer, processer, buyer, and seller acquired about Feb. 28, 1957.

Partnerships and Individuals

About Sept. 8, 1955, it acquired from J. R. Dellinger certain land in Washington County, Mo., and a mining lease covering other land in the county, both pieces of land containing a substantial amount of recoverable barite reserves. About the same day, Superbar (later acquired by Magnet Cove) acquired from Mr. Dellinger a washing plant, magnetic separator, and mining equipment used by him in producing barite from this land. About May 2, 1956, Magnet Cove acquired land in Washington County, Mo., from Howard A. Wolf, containing a substantial amount of recoverable barite reserves, together with a barite washing plant and mining equipment.

NATIONAL LEAD

Corporate

L. A. Wood, Inc., Sweetwater, Tenn., a producer, processer, and seller acquired on May 21, 1956.

Barytes Mining Co., Potosi, Mo., a producer and seller acquired about May 7, 1956.

Partnerships and Individuals

About June 1, 1956, National Lead acquired from Finlen & Sheriden Mining Co., Butte, Montana, all mineral rights and property used by this partnership in conducting its barite business in Missoula County, Montana.

The effects of the acquisitions, the complaints allege, may be substantially to lessen competition or to tend toward monopoly in:

the production and sale of crude barite; the buying and processing of both crude and crushed and ground barite; the selling of it to well-drilling, chemical, paint, and other industries; the prices, supply, and quality of barite; and the producing, processing, buying, and selling of it. As an illustration of the companies' dominance in this highly concentrated industry of rapidly growing importance, the complaints give these statistics: Of the 1953 production of 920,000 tons of crude barite, Magnet Cove produced 24% and National Lead 30%. In 1956, the former accounted for 32% and the latter for 31% of the nation's production of 1,350,000 tons of crude barite. Magnet Cove's share of the total sales of crushed and ground barite increased from about 27% in 1953 to about 44% in 1956, while National Lead's share was approximately 47% in 1953 and 38% in 1956. In dollar volume, Magnet Cove's sales of crushed and ground barite rose from less than $5.5 million in 1953 to better than $18.2 million in 1956, and National Lead's sales jumped from $9.7 million to $15.9 million. Together, the companies accounted for 54% of the country's crude barite in 1953 and 63% in 1956; and for 74% of the total sales of crushed and ground barite in 1953, and 82% three years later.

F. T. C. v. *F. A. Gosse Co.* (FTC Dkt. #7099, Complaint, April 21, 1958).

F. A. Gosse Co., Seattle, Wash., a primary broker of canned salmon and other food products, was charged by the Federal Trade Commission with granting illegal brokerage to some of its customers. The firm and its president, Frederick A. Gosse, the complaint alleges, have favored certain buyers with substantial allowances in lieu of brokerage or price concessions reflecting brokerage. In some transactions the unlawful rebates are not charged back to the packer-principals in whole or in part but are absorbed from the firm's customary 5% brokerage fee, the complaint says. In other instances, the payments are shared by Gosse and the field broker involved out of the 2½% split each receives. (A field broker is one hired to handle transactions in marketing areas other than Seattle.) According to the complaint, these typical means have been used to make these allowances to favored buyers: (1) selling at net prices less than the amount accounted for to the packer-principals; (2) granting price deductions, a part or all of which were not charged back

to the packer-principals; and (3) taking reduced brokerage on sales involving price concessions. These practices, the complaint concludes, violate Sec. 2(c) of the Robinson-Patman Amendment to the Clayton Act.

F. T. C. v. *Brice and Johnson* (FTC Dkt. #6969, Consent Order, April 21, 1958).

The Federal Trade Commission approved a consent order prohibiting a Miami, Fla., produce jobber from receiving illegal brokerage on purchases made for its own account. Named in the order are Ed and Clyde B. Coyner, who trade as Brice & Johnson. The partners also are cited as officers of Coyner-Evans Co., Inc., a produce brokerage firm they direct and control through stock ownership. Both companies have offices in Miami. The Commission adopted a consent order by Hearing Examiner John B. Poindexter containing an order agreed to by the parties and the Commission's Bureau of Litigation. According to the FTC's complaint of Dec. 4, 1957, during 1956 and 1957 Brice & Johnson made many purchases of celery and other food products through its controlled intermediary, Coyner-Evans Co. In these transactions, the complaint alleged, the latter concern accepted brokerage fees as an independent broker although it was acting for the partnership. Through their ownership and control of the brokerage firm, the complaint charged, the partners received something of value as brokerage on their own purchases, which is a violation of Sec. 2(c) of the Robinson-Patman Amendment to the Clayton Act. The order prohibits this practice in the future.

U. S. v. *American Natural Gas Company, et al.* (D. C. E. D. Wis., Indict., April 30, 1958).

Attorney General William P. Rogers announced that a federal grand jury in Milwaukee indicted three natural gas companies and three corporate officials on charges of violating Sections 1 and 2 of the Sherman Antitrust Act. The companies named as defendants were American Natural Gas Company, Northern Natural Gas Company and Peoples Gas Light and Coke Company. According to the indictment each of these companies either directly or through subsidiaries is engaged in marketing natural gas. American is the sole supplier of natural gas to Wisconsin except for a small amount delivered to Burlington, Wisconsin. Peoples is the sole supplier to

the metropolitan area of Chicago. Northern is the sole supplier to Minnesota. Victor R. Hansen, Assistant Attorney General in Charge of the Antitrust Division, stated, "The indictment seeks to insure that private groups cannot—without bringing on a criminal proceeding—conspire to deprive any section of this country of needed fuel supply." Count one of the indictment charges that the defendants, commencing in or about 1954, have engaged in a combination and conspiracy to monopolize interstate trade and commerce in the transmission and sale of natural gas in the States of Wisconsin, Minnesota, and parts of Illinois and Michigan. Count two charges them with a combination and conspiracy unreasonably to restrain that trade, while counts three and four allege that the defendants have attempted to monopolize and have monopolized it. Individuals named as defendants are Ralph T. McElvenny, President and Director, American Natural Gas Company, John F. Merriam, President and Director, Northern Natural Gas Company, and James F. Oates, Jr., former Chairman of the Board, Peoples Gas Light and Coke Company. The indictment named as co-conspirators, but not as defendants, Frank M. McMahon, President, West Coast Transmission Company, Calgary, Alberta, Canada, and Russell E. Ritchie, Vice President, Stone & Webster Corporation.

The terms of the conspiracy as set out in the indictment have been that the defendants and the co-conspirators agree to:

(a) Maintain free from competition respective service areas in Wisconsin, Minnesota, Michigan, and Illinois within which the defendants American, Northern, and Peoples shall operate;

(b) Exclude Midwestern Gas Transmission Company as a competitor in the interstate transportation and sale of natural gas in said states;

(c) Boycott and refuse to purchase natural gas from Midwestern;

(d) Attempt to obstruct and prevent Midwestern from obtaining natural gas from Canadian sources;

(e) Contract to supply natural gas to unserved communities for the purpose of absorbing markets which would otherwise be available for a potential competitor;

(f) Cooperate closely and coordinate their activities for the purpose of preventing the interstate transportation and sale of natural gas in said states by any new competitor.

The effects of the offenses allege in the indictment as follows:

(a) Consumers of natural gas in parts of Wisconsin, Minnesota, Illinois and Michigan have been prevented from obtaining natural gas;

(b) Supplies of natural gas have been kept from the market in parts of Wisconsin, Minnesota, Illinois and Michigan;

(c) Midwestern has been excluded as a competitor of the defendants American, Northern and Peoples in the interstate transmission and marketing of natural gas.

According to the indictment, the demand for natural gas has been constantly increasing during the last several years in the States of Wisconsin, Illinois, Michigan and Minnesota and supplies of natural gas available to consumers, including industrial users, have continually fallen short of the demand. Natural gas is critically important to the continued industrial growth and development of these states, and many industries otherwise willing to expand or locate therein will do so only when they are assured of adequate supplies of natural gas for fuel and power. In addition, natural gas is an economical, clean source of fuel for the space heating of dwellings and places of business. Operating revenues of the defendant corporations and their subsidiaries during 1956 amounted to $158 million for the American companies, $112 million for the Northern companies and $160 million for the Peoples companies.

F. T. C. v. *Whiz Fish Products Co.* (FTC Dkt. #7089, Complaint, April 8, 1958).

Whiz Fish Products Co., Seattle, Wash., was charged today by the Federal Trade Commission with paying unlawful brokerage to some customers. Alleging violation of Sec. 2(c) of the Robinson-Patman Amendment to the Clayton Act, a Commission complaint alleges the company grants favored customers discounts or allowances in lieu of brokerage. On direct sales not involving brokers, the complaint charges, favored buyers are granted a discount approximating the normal brokerage fee of 2½%. Also, certain customers are

given reduced prices reflecting the brokerage generally paid, the complaint says. In other transactions where sales are made through brokers, the complaint continues, the company gives favored customers reductions, offsetting them by cutting the broker's commission. In addition to selling its own pack of canned salmon, tuna, and other seafood, the complaint says, the company distributes seafood packed by others as well as some jointly packed by itself and others.

F. T. C. v. *Maguire Industries, Inc.* (FTC Dkt. #7090, Complaint, April 7, 1958).

Maguire Industries, Inc., Mt. Carmel, Ill., a manufacturer of electronic components, was charged by the Federal Trade Commission with discriminating in price among its customers and capturing competitors' trade by illegal methods. Under Maguire's annual rebate program, a Commission complaint alleges, some distributors of radio and television repair parts are charged higher prices for coils and transformers than their competitors buying in greater volume. According to the complaint, annual rebates are based on the percentage of customers' purchases from Maguire compared to their purchases from all sources the previous year. Maguire pays a 10% rebate to those customers whose purchases equal the previous year's total requirements, 7½% to those equalling 75%, and 5% to those equalling 50%. Customers purchasing from the company less than 50% of their previous year's requirements receive nothing. Alleging violation of Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act, the complaint charges these discriminations substantially may lessen competition between Maguire and its competitors, and among its distributors. The complaint further charges that Maguire uses unlawful means to induce customers to handle its coils and transformers exclusively and discontinue stocking competitors' products. A 10% rebate is paid to customers agreeing to purchase solely from Maguire, the complaint says. The company buys up their stocks of competitive products and sells them to competitors' distributors at less than cost or much less than the price charged by competitors. This enables these distributors to sell at lower prices than competitors' customers, the complaint alleges. Maguire's unlawful practices, the complaint continues, unreasonably restrain competitors and demoralize their markets. By

selling competitive products at low prices or below cost, the complaint charges, Maguire severely damages the products' reputation and forces distributors to stop buying from competitors at regular prices or risk meeting the low prices offered by others who bought identical products from Maguire. The complaint concludes that these unfair methods of competition violate the FTC Act. According to the complaint, Maguire's business in electronic components is conducted under the name of its wholly-owned division, Thordarson-Meissner Manufacturing Division. In 1957 Maguire's total sales exceeded $2.4 million.

F. T. C. v. *American Packing Co., et al.* (FTC Dkt. #6904-07, Consent Orders, May 1, 1958).

The Federal Trade Commission approved consent orders prohibiting the following Seattle, Wash., packers of canned salmon from making illegal brokerage payments to their customers: *American Packing Co., Farwest Fishermen, Inc., Queen Fisheries, Inc., Alaska Transportation Co., Pelican Cold Storage Co.* and *Coastal Glacier Sea Foods, Inc.* The Commission adopted separate initial decisions by Hearing Examiner Abner E. Lipscomb containing consent orders agreed to by the respondents and the Commission's Bureau of Litigation. The FTC's complaints of Oct. 7, 1957, charged the packers with granting large grocery chains discounts or allowances in lieu of brokerage in violation of Sec. 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. The complaints cited these typical methods used to make these payments: On direct sales not involving brokers, they reduce the market price to the chains by the customary brokerage fee of 5%; when only one broker is used, either a primary or field broker, these favored customers are given a 2½% reduction and the price differential is taken out of the broker's commission. The packers generally sell through both types of brokers, the complaints said. Primary brokers are the selling agents for the Seattle area while field brokers are those employed by the primaries to handle transactions elsewhere. The specific allegations in the complaints were these: American Packing Co. gave the chains discounts by (1) reducing prices on direct sales by the 5% which normally would be paid for brokerage, (2) granting a reduction of 2½% where only one broker is used, and (3) allowing a 2½% discount on sales made through the buyers' own pur-

chasing agents. Farwest Fishermen, Inc., granted brokerage to the chains by (1) reducing prices about 2½% where either a primary or field broker was not used, (2) selling through primaries at a net price below that shown by the broker, with the difference being absorbed by the broker out of commissions, and (3) granting direct or indirect price reductions by cutting brokerage earnings of the primary or field brokers. Queen Fisheries, Inc., made sales to a large grocery chain through the chain's buying agent at price reductions approximating the 5% commissions usually paid on sales made through brokers. The affiliated Alaska Transportation Co. group sold direct to large grocery chains at prices reduced by the 5% usually paid for brokerage.

Notes

Department of Justice Activity

1. *Department of Justice Seeks New Antitrust Weapon*: The Justice Department is trying to initiate legislation which would facilitate its job in prosecuting civil antitrust suits. Under the existing situation the Department must rely on the cooperation of the firm under investigation in order to secure pertinent records and papers. The new bill would allow the department to demand the surrender of such information, and there would be severe penalties for destruction or removal of records or other methods of non-compliance.

As the law stands today, if a firm is unwilling to cooperate, the Justice Department's only recourse is to a grand jury. According to the bill's opponents, the fact that the new legislation would change this situation is one of its main objections; it is a departure from the concept of separation of executive and judicial power.

Assistant Attorney General Hansen, who is mustering support for the bill, feels that the courts could protect against any abuse which might result from granting more power to the Justice Department, and any difficulty would be overweighed by the advantage of removing so great an obstacle from civil antitrust proceedings.

2. *Antitrust Suit Filed Against Dyestuffs Manufacturers*: A civil antitrust action charging four corporations with Sherman Act violations in the sale of dyestuffs was filed May 29.

According to the complaint, Ciba Company, Geigy Chemical Corp. and Sandoz Inc. are wholly owned by three foreign dyestuffs manufacturers who also jointly own Toms River-Cincinnati Chemical Corp., the fourth named defendant. Ciba, Geigy and Sandoz purchase approximately 60 per cent of their dyestuff requirements from Toms River, which sells exclusively to these three firms, and allegedly purchase their remaining requirements from their foreign parents and domestic manufacturers.

The total annual sale of dyestuffs by the first three defendants to other manufacturers, jobbers, dealers, dyers and tanners, amounts to more than $34 million. The complaint alleged that the defendants handle about 20 per cent of this country's sale of dystuffs and have devised a plan to maintain and stabilize the prices at which the three would resell the dyestuffs purchased from Toms River.

The suit, filed in the Federal District Court in New York, seeks injunctive relief designed to restore a competitive pricing system to the industry.

3. *Antitrust Suit Filed Against Whitin Business Equipment Corporation*: A civil antitrust complaint was filed in the Federal Court at Boston, May 29, against the Whitin Business Equipment Corporation, alleging Section 1 violations in the manufacture, sale and distribution of rotary offset duplicating machines. These machines are used in the printing and graphic arts trades, and the defendant company's annual sales have a retail value of about $2 million.

Named as co-conspirators were Gestetner, Ltd., who license the defendant; American Type Founders Co., who distribute the machines; Photostat Corporation, who sell them to the ultimate consumer; and Whitin Machine Works, the parent of the defendant.

The complaint alleges that the defendant and the co-conspirators conspired to fix the resale prices for the machines, to allocate domestic customers in the sale of the machines, to divide world markets for the manufacture and sale of the machines, and to restrict exports from and imports to the United States.

These machines have gained a fairly wide acceptance in the printing and graphic arts trades despite the short period of time over which they have been available. Assistant Attorney General Hansen hopes that the granting of the injunctive relief sought will

benefit the industry as well as the printing and graphic arts industries generally.

4. *Hansen Discusses Antitrust and Foreign Trade*: Assistant Attorney General Victor R. Hansen delivered an address before the Washington Foreign Law Society on May 10 on the subject of, "The Impact of the United States Antitrust Laws on Foreign Trade and Investment."

Mr. Hansen noted our government's policy of encouraging foreign trade and investment over recent years through mutual assistance, technical aid, the guaranty investment program and the Export-Import Bank, and spoke of the current interest attached to the impact of our antitrust laws on this policy.

As an example of the effect of the antitrust laws in promoting foreign trade, Mr. Hansen cited the *SKF Industries* judgment, one year after which SKF, the American company, increased its foreign sales 33 per cent and its backlog of unfilled orders 170 per cent after removal of restrictions imposed by the Swedish parent company. Also cited was the *ICI* decision,[1] which enabled the British company to increase its United States imports from a half million dollars to 5½ million dollars within a year following the termination of mutually restrictive agreements with the American du Pont Company.

The three subjects on which Mr. Hansen concentrated were: (1) the jurisdictional question of when acts abroad are within the scope of the antitrust laws; (2) antitrust problems connected with foreign licensing; and (3) operations under the Webb-Pomerene Act.

"First, as to jurisdiction, the Supreme Court has uniformly held that our antitrust laws were intended to apply to restraints upon the foreign commerce of the United States." In the *American Tobacco* case of 1911,[2] the *Sisal*[3] case of 1927, the *Alcoa*[4] case of 1945 and the *Incandescent Electric Lamp* case of 1953,[5] this principle was clearly stated. In deciding the *Alcoa* case the Court, "while stating

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1 *U. S.* v. *ICI*, 105 F. Supp. 215, 220, S. D. N. Y. (1952).

2 *U. S.* v. *American Tobacco Company*, 221 U. S. 106 (1911).

3 *U. S.* v. *Sisal Sales Corporation*, 274 U. S. 268 (1927).

4 *U. S.* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

5 *U. S.* v. *General Electric Co.*, 82 F. Supp. 753 and 115 F. Supp. 835.

that the Sherman Act should not be read 'without regard to the limitations customarily observed by nations upon the exercise of their powers,' founded its findings of liability upon the expressed intent of the parties to affect United States commerce and the injurious effect within the United States which followed."

The second major point in Mr. Hansen's speech was the transfer of technology abroad that has been encouraged by the government and is an activity now engaged in by many American companies. The two main problems for antitrust adjudication in this field are licensing under patents and agreements concerning trade mark licenses.

On the subject of patent licenses, Mr. Hansen said that although the Ninth Circuit Court's decision in the *Brownell* v. *Ketchan* case of 1954[6] had held that a patentee by virtue of a United States patent could place restrictions upon United States imports and exports, the Supreme Court has in several instances held otherwise. He emphasized the difference between asserting rights under patents, on the one hand, and, on the other, asserting rights under contractual obligations not to import or export. The latter is unlawful as held in the *National Lead* case,[7] among others.

In the case of trademarks, it was held in the *Timken*[8] case that agreements not to compete between American and foreign companies were not justified by trademark licenses.

Mr. Hansen then turned to his third point, the Webb-Pomerene Act as an exception to the Sherman Act. He discussed the only two cases of importance under the Act, the *Alkali*[9] case and the *Minnesota Mining*[10] case. In the *Alkali* case the Court emphasized that, "The rule of competition, basic in American economic philosophy and approved by express legislative fiat in the Sherman Antitrust Act, is equally applicable to our export trade as it is to trade among the several states." The Webb-Pomerene Association was found guilty of conspiring to restrain trade.

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6 *Brownell* v. *Ketchan Wire & Mfg. Co.*, 211 F. 2d 121 (9th Cir. 1954).

7 *U. S.* v. *National Lead Co.*, 63 F. Supp. 513, aff'd 332 U. S. 319 (1947).

8 *U. S.* v. *Timken Roller Bearing Co.*, 341 U. S. 593 (1951).

9 *U. S.* v. *U. S. Alkali Export Association*, 58 F. Supp. 785 (S. D. N. Y. 1945) aff'd 325 U. S. 196 (1945); 86 F. Supp. 59 (S. D. N. Y. 1949).

10 *U. S.* v. *Minnesota Mining & Manufacturing Co.*, 92 F. Supp. 947 (D. Mass. 1950).

In the *Minnesota Mining* case, the Court "held that the Webb-Pomerene Act was not a justification when the members of an export association, dominant in the abrasives industry, pursued a course of action whereby the export association gradually ceased to export and, instead, joint foreign members supplied the foreign markets."

In closing, Mr. Hansen stated that the Department of Justice seeks to enforce the antitrust laws to prevent unlawful restraints from interfering with foreign trade with due concern for the other policies of our government and with a consideration of the sovereignty of other nations.

5. *Redesigning Antitrust Enforcement*: A blueprint for a new antitrust enforcement policy has been suggested by a study conducted by Ewald T. Grether, Dean of the University of California's School of Business Administration, and Carl Kaysen, of Harvard University's Economics Department.

The plan stresses the economic, rather than legal, aspects of antitrust. It suggests that more emphasis be directed toward the basic industries—steel, autos, chemicals, oil—which have a broad impact on the national economy, and less stress placed on industries of limited economic effect—pickle packing or the the manufacture of bronze grave markers. A Justice Department official said the basic idea of the plan is " . . . to pay more attention to redesigning basic industries and less to simple violations of the law."

According to the study, the Justice Department should rely more heavily on measuring a company's share of its industry's market as a basis for prosecution, and should be less willing to accept mild remedies in place of dissolution.

Dean Grether and Professor Kaysen emphasized the conclusion that the "government must have an economic theory of the case as well as a legal theory." They urged that when such issues as market shares, prices and profits are under consideration, professional advice from trained economists should be obtained.

The report cited several cases which, in the opinion of its authors, could have been argued more successfully had the economic issues been defined with greater care.

The study recommended that the Antitrust Division's staff of 20 economists be substantially expanded. If the proposals are adopted it would require a 10 per cent to 15 per cent increase in the Divi-

sion's $3.8 million annual expenditures, which could not be obtained until the fiscal year beginning next July.

6. *29 Oil Companies Indicted in Price-Fixing Case*: The purpose of the government's antitrust suit against 29 oil companies seems to be to break that industry's practice of buyers posting prices for crude.

The 29 companies were indicted by a grand jury for price-fixing; the next step in the case will be on July 10, when Federal District Judge Albert V. Bryan will hear arguments on the government's motion to impound company records and documents collected by the grand jury.

Two indications of the Justice Department's objective are: (1) West Coast companies, which buy crude mostly under contract with producers, were not included in the case, and (2) in a speech by Assistant Attorney General Victor R. Hansen in mid-May, it was pointed out that the industry's crude pricing practice was an area being closely studied.

Although the Justice Department has not stated what method of crude purchasing it would approve, two alternatives are, price setting by the producers and contract buying.

If the government wins the suit it may mean the divorcement of crude buying from integrated oil companies. Middlemen or brokers would assume the position now occupied by service divisions of refiners or integrated companies.

Mergers

1. *Pre-Merger Notification Bill Attacked*: The proposed pre-merger notification bill is being attacked on the grounds that it may cause more, not less, concentration. The bill, backed by the Justice Department and the FTC, would require companies planning mergers involving assets of $10 million or more, to notify the FTC of their plans and then wait 60 days before executing the merger.

H. M. McClure, Jr., president of the McClure Oil Co. and the National Stripper Well Association, and a member of the executive committee of the Independent Petroleum Association of America, argued before the Senate Antitrust Committee that such a bill would restrict the ability of independent oil producers to raise capital by selling assets. McClure contended that "The freedom to trade

properties is particularly vital to the independent oil producer . . . He must have unrestricted opportunity to buy and sell assets and do it quickly." Since the time element is often important, McClure stated, the need to give the government 60 days notice could drive the small producer out of business. The argument continues that since large producers have sources of capital other than selling an interest in their business, the bill would hamper the ability of small business to compete and increase concentration rather than lessen it.

2. *FTC Ruling*: The Federal Trade Commission ruled that it is not a *per se* violation of the antitrust laws for two companies with 50 per cent of a market to merge. In the Commission's opinion such factors as "the general competitive situation, number of competitors, and degree of concentration" must also be considered.

3. *ICC Regulation of Trucking Mergers Attacked*: A report by the Senate Small Business Committee, based on hearings held last summer and a special study of ICC actions on trucking mergers, attacked former ICC chairman Owen Clarke's statement that the trucking industry "needs more concentration" and asserted that the Commission is lax in its regulation of trucking mergers.

The report charges the ICC with approving mergers of large truckers more readily than those of small carriers. Committee Chairman John Sparkman said the Commission should be more concerned about a situation "in which less than 5 per cent of the carriers do more than 60 per cent of the regulated trucking business."

The report did not propose any new legislation but recommended that the Commission should (1) record results of merger applications, evaluate the level of concentration in the trucking industry, and consider the impact of mergers on competition; (2) apply the same standards in considering merger applications from both large and small carriers; and (3) the Justice Department should continue to intervene in cases before the ICC whenever antitrust issues arise.

4. *Merging for Money and Talent*: After the Osborn-Kemper-Thomas advertising specialty house was sold, Kemper Industries Inc., the shell that remained, consisted of $1.3 million in cash and receivables and two employees, the former president and vice-president.

The L. E. Waterman Pen Co., Ltd., was looking for money and executive talent; the two executives were looking for a likely spot

for the Kemper money and for their advertising backgrounds; so a merger with an interesting objective was achieved.

Fair Trade

1. *Court Dismisses Parke, Davis Case*: District Judge Joseph R. Jackson dismissed the government's civil antitrust case against Parke, Davis & Co., a major pharmaceutical producer. The government's charge was that Parke, Davis had conspired with drug wholesalers and retailers in Washington, D. C. and Virginia to prevent cut-rate sales of its products, and had boycotted a cut-rate drug dealer because he sold Parke, Davis products below the suggested price.

The Justice Department argues that by refusing to deal with retailers who will not abide by the manufacturer's price, the latter can achieve the objectives of fair trade even in states that do not sanction this practice.

2. *West Virginia and Kentucky Non-Signers Clause Illegal*: In both West Virginia and Kentucky the non-signers clause of their Fair Trade Acts were held unconstitutional on the grounds that they invaded constitutional liberty (Kentucky) and were deprivations of property rights (West Virginia).

3. *Fair Trade Upheld in Arizona*: The Arizona Fair Trade Act, including the non-signers clause, was held to be a proper exercise of the state's police power and was held constitutional. It was decided by Arizona's Supreme Court that the Act does not violate either the due process clause or the equal protection of the law clause of the United States' or of Arizona's constitution.

4. *Fair Trade and Small Appliances*: The demise of fair trade in the small appliance markets has caused several large manufacturers to initiate some new distribution policies.

The General Electric Co.'s Housewares & Radio Receiver Division is now selling its new top model automatic blanket direct to franchised dealers. Retailers who get the franchise must agree to observe GE's prices. This method eliminates the wholesaler, but it is only being adopted, thus far, for this particular model.

Procter Electric Co. is also trying to make its products more profitable to dealers. The Company has lowered its price on irons

and toasters; distributors will pay 50 per cent off suggested retail price instead of 40 per cent and wholesale prices will be cut by between 2 per cent and 8 per cent.

Sunbeam Corp. and Dormeyer Corp. also announced that they were eliminating some wholesale distributors. Sunbeam is asking the remaining distributors to agree to furnish such services as: salesmen to call on retailers, adequate warehouse space, facilities and stock, extension of credit, prompt deliveries, and sales aid to retailers. The agreement also defines the area in which the distributor is to operate. The new reduction in the number of distributors is apparently due to a decrease in the number of retailers who handle small appliances. Sunbeam's vice-president and general manager, C. C. Mendler, attributes this to "confusion . . . in the market place" following fair trade's disappearance. Mr. Mendler says this has resulted in "too many Sunbeam distributors in proportion to the number of active Sunbeam retailers."

Antitrust

1. *Five Drug Houses Indicted in Price-Fixing Case*: A grand jury indicted five major pharmaceutical companies for illegally conspiring to fix prices and eliminate competition in the sale of Salk polio vaccine.

Complaints by local and state officials that they were receiving identical bids and fixed prices for the vaccine began an investigation by the Justice Department that culminated in last month's indictment.

The five companies: Eli Lilly, Allied Laboratories, American Home Products, Merck, and Parke, Davis, were accused by the grand jury of conspiring to (1) submit uniform bids to public agencies, (2) adopt noncompetitive terms and conditions of sale, and (3) establish uniform pricing methods. All denied any collusion. Merck said it charged the market price when it went into production late despite the fact that it could have charged more, because it wanted to alleviate the shortage without being accused of profiteering.

Lilly, the largest producer, has cited five voluntary price reductions since the vaccine was offered for sale.

The government plans to sue for the actual money damages incurred under a 1956 law which will be used for the first time.

2. *Sports and Antitrust*: The House of Representatives voted to exempt most aspects of the major professional team sports from the antitrust laws.

Baseball is already exempt because of Supreme Court rulings, but professional football, basketball, and hockey are now covered by the antitrust laws.

The House Bill would enable these teams to regulate broadcasting and telecasting, make territorial agreements and use any kind of player contracts without fear of antitrust prosecution.

The Senate Antitrust Committee will begin hearings on this subject on July 8.

Robinson-Patman

The FTC ruling in *Simplicity Pattern Company, Inc.* v. *FTC*, to the effect that cost justification is not a defense to a Robinson-Patman Act charge of discrimination in supplying to large customers various services and facilities not furnished to smaller customers, has been held invalid by the Court of Appeals for the District of Columbia Circuit.

The Court also held, however, that it is not necessary for the Commission to prove that competition by favored customers has injured neglected customers in order to establish a *prima facie* case under Section 2(e).

Business Failures

According to a Dun & Bradstreet report, business failures in March, 1958 were 12 per cent higher than in March, 1957, and 21 per cent higher than in February. It was the highest number of casualties (1,495) in any month since January, 1939.

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NOTES

Appointment of Samuel L. Williams of Herndon, Va., as chief project attorney for the Federal Trade Commission was announced by FTC Chairman John W. Gwynne, April 9, 1958. Mr. Williams, a career employee, has served the Commission as attorney-examiner and project attorney since 1934. In his new post, Mr. Williams will be in immediate charge of all FTC project attorneys, who, in turn, are responsible for directing and expediting individual investigations of alleged law violations.

Letter to Editor

Dear Mr. Zaidins:

When I first read Professor Handler's Annual Review reprinted in the October 1957 issue of "The Record," which has been reprinted in the September-December 1957 issue of "The Antitrust Bulletin," I was troubled by the statement relating to *United States v. E. I. du Pont de Nemours & Co.*, 353 U. S. 586 (1957) "That the government's Clayton Act contention was merely a makeweight is apparent from the briefs" (bottom p. 651 of Bulletin reprint).

The impression gathered from Professor Handler's text, which includes reference to any excerpt from Mr. Justice Burton's dissenting opinion, is that Mr. Justice Brennan seized upon a contention not put forward seriously by the government as decisive in the case.

That so important a decision as the du Pont-General Motors decision should be alleged to hang by so thin a strand seemed to me to be serious in its implication.

With the above question in mind I was particularly interested when a lawyer, formerly in the Antitrust Division, called my attention to the fact that the Division, as early as 1953, determined to emphasize the Section 7 aspects of the Government's brief in the district court in the then pending du Pont-General Motors suit. At that time a memorandum was prepared by the Section Chief in charge of the case and approved by the Assistant Attorney General, commenting on a draft of the district court brief. One paragraph of that memorandum reads as follows:

> "The only definite critical suggestion that I can now make is one you anticipate; namely, the Section 7 part. It is weak and I don't think it should be dropped; it should be strengthened it seems to me, by giving much greater emphasis to the 'tend to create a monopoly' argument."

Query in the light of the above whether the Handler-Burton characterization on the Department's position in regard to the applicability of Section 7 of the Clayton Act to the du Pont-General Motors litigation is appropriate, or fair to Mr. Justice Brennan and the

majority position in the case. The Supreme Court's opinion would seem to be more than merely a tribute to the prescience of the staff of the Antitrust Division.

Very truly yours,

/s/ William R. Burt

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